Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-104

SAVE OUR WETLANDS, INC., (SOWL)
Plaintiff-Appellant

versus

EDWARD H. LEVI, Attorney General of the United States of America, COL. EARLY RUSH, Commander, New Orleans District U.S. Army Corps of Engineers and WEBB HART, President of St. Tammany Parish police Jury and LEISURE, INC.

Defendants-Appellees

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

I.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

This case originated in the Eastern District of Louisiana bearing the case number 75-3155 and was decided by the District Court on a motion for summary judgment on the grounds of res judicata and collateral estoppel. It was disposed of by the Fifth Circuit Court of Appeal affirming the District Court in matter number 78-2704 on its summary docket.

The original case upon which the res judicata and collateral estoppel are based also arose out of the United States District Court for the Eastern District of Louisiana in case number 74-2919, Section "H" where the petition was dismissed on the basis of laches. That the District Court decision

was also affirmed by the United States Court of Appeals for the Fifth Circuit in proceedings number 75-1750 which was reported in 549 F.2d 1021, 1026-1027, Fifth Circuit 1977.

A petition for writ of certiorari of that decision was filed in this Court and assigned the number 75-1750. The judgment in the District Court case was rendered on July 17, 1978 and signed by the Judge on July 17, 1978 and entered on July 19, 1978.

II.

GROUNDS FOR JURISDICTION

Petitioners are appealing a decision of both the Federal District Court and the Federal Court of Appeals, its basic appeal jurisdiction:

1. The judgment of the Fifth Circuit Court of Appeals was rendered on and was entered on

2. The jurisdiction of the Court is conferred by Article III, Section 2, Clause 2 of the United States Constitution.

III.

QUESTIONS FOR REVIEW

Whether the defense of laches resulting in the dismissal of a prior suit on grounds which do not involve the merits of the case can be used to invoke the doctrine of res judicata in a subsequent lawsuit.

LEGAL BASIS FOR CLAIM

1. *The National Environmental Policy Act of 1969*, 42 U.S.C.A., Section 4331-4347.

2. *The Fish & Wildlife Coordination Act*, 16 U.S.C.A., Section 661, et seq.

3. *The Rivers & Harbors Act of 1899*, Title 33, U.S. Code, Section 403.

4. *Refuse Act of 1899*, Title 33, U.S. Code, Section 407;

5. *The Interstate Land Sales Act*, U.S.C. 15:1701;

6. *Executive Order Number 11514, Protection and Enhancement of Environmental Quality*, 35 Fed. Register 4247, March 7, 1970;

7. *The Federal Water Pollution Control Act* as amended 1972, 33 U.S.C. 1151 et seq.

IV.

STATEMENT OF THE CASE

On October 29, 1974 plaintiff, Save Our Wetlands, Inc. and one individual plaintiff, filed a lawsuit against the United States Corps of Engineers and the other appropriate Federal and State Governmental agencies as well as the private owners of two development areas on the shores of Lake Pontchartrain in the State of Louisiana known as Eden Isles and Mariner's Village requesting injunctive and declaratory relief on the basis of the failure of the appropriate federal and state

authorities to properly enforce the law by requiring that the required procedure of preparation of an environmental impact statement and study be required prior to the issuance of any permits and by permitting a development without the issuance of permits.

Hearings were held before a magistrate who had been designated as Special Master at the end of November in 1974 and the issues of a preliminary injunction and laches. On December 19, 1974 the Magistrate recommended that the preliminary injunction be denied and that the suit against one of the developers be dismissed on the basis of laches. On January 3, 1975 a hearing was held with regard to the issue of laches as to the other development called Eden Isles and on January 10, 1975 the U.S. Magistrate recommended that the suit against Eden Isles be dismissed as barred by laches. On January 27, 1975 the trial court issued an order adopting the Special Master's report and recommendation and first supplemental report and recommendation as its opinion. On February 25, 1975 the District Court issued its final judgment reinstating its earlier order adopting the Special Master's report and recommendation dismissing the case against Eden Isles as well on the basis of laches. This was proceedings number 74-2919 of Section "H" of the United States District Court for the Eastern District of Louisiana. On March 17, 1975 a notice of appeal was filed against all of the defendants except Bradley McDonald, basically contesting the decision insofar as it applied to the development known as Eden Isles.

During the pendency of that appeal, plaintiffs learned that within a month of the time that the last judgment or order was signed by the Judge in the first lawsuit, the defendants began dredging on the eastern portion of Eden Isles

inspite of this language of the judgment of January 27, 1975 which was reinstated by the court's judgment of February 25, 1975:

> ". . . The Special Master found that neither Bradley McDonald nor Leisure nor any other defendant contemplate further dredging, canal construction, or other related type work. Much of the area known as Eden Isles has been sold to other parties not before the Court, and there is no evidence that any such parties contemplated dredging, canal construction, or other work that would arguably require federal permits or any "major federal action" within the meaning of NEPA.
>
> Moreover, the continuing effect of the Federal Water Pollution Control Act and other federal statutes impose on-going responsibilities on the part of the developers and land owners, in violations of these statutes can result in revocation of any existing permits 1/ or other punitive action.
>
> The Court concurs that plaintiffs' suit against the substantially complete developments outlined in the Special Master's reports and shown in *defendants' exhibits L-1* and *160* and *Bradley Mc Donald's Exhibit 10*, is barred by laches; however, any further work that might be contemplated by defendants or third parties at either development is unaffected by this opinion, and would of course, proceed in accordance with all applicable laws and would be subject to review in the courts."

Pursuant particularly to the language of the last clause of the

last paragraph of the quotation, in August of 1975, when they learned of dredging on the eastern portion of Eden Isles the plaintiffs filed this lawsuit in proceedings number 75-3155, Section "H" after having attempted to introduce and supplement the record of the appeal in the first case which was denied by the Fifth Circuit. After the second lawsuit was filed, Judge West, the trial judge in both cases originally, at first indicated that he was interested in learning exactly what plans the defendants had in mind for the Eden Isles East development particularly in view of the well publicized traffic loop of I-10 which was to be constructed where I-10 crosses onto the north shore of Lake Pontchartrain between the Eden Isles East totally undeveloped and Eden Isles West (considered substantially complete by the court) development. He also indicated that, in accordance with the statement set forth above in his judgment of January 27, 1975 that the "other parties not before the court" to whom he referred in that judgment should now be made parties to this lawsuit so that they would not be unfairly prejudice. In accordance with his instructions, plaintiffs made the appropriate research, asked for the appropriate discovery, and moved the court to make those parties parties to this lawsuit. A ruling was never held on any of those motions nor, as far as the plaintiffs can determine did the subsequent trial judge, after the death of Judge West, consider those or specifically refer to those in his judgment dismissing the matter on the basis of res judicata. It is particularly interesting in view of the fact that according to Louisiana law, the State of Louisiana is the owner of the particular wetlands in question. *State v. Placid Oil Co.*, 300 So.2d 154, La. S. Ct. 1974.

V.

STATEMENT OF FACTS

Maps dated 1852 and 1858 approved by the Louisiana State Land Office show the Eden Isles area as "seamarsh" (plaintiffs' exhibits 180 and 181 of the first lawsuit shown in the appendix thereto). St. Tammany drainage District No. 2 was originally constituted in 1925 (Special Master's findings 1/16/75 No. 2 of the first case). No permits were ever issued to Drainage District No. 2 of St. Tammany Parish, Louisiana, for the levees, canals, and pumping stations which were completed in 1929 (plaintiffs' exhibit 38 of the first case). Because of the economic depression in approximately 1929-1930, there was a forfeiture of bonds and Drainage District No. 2 became defunct; therefore, this system was not maintained during the depression years and the area known as Eden Isles was abundant with soft shell crabs, shrimp, and certain species of game birds, and was commercially fished by various persons, including some members of the SOWL and their families (Special Master's findings 12/19/74 No. 8-9 of the first case). Aerial photographs show the area as being reflooded after the depression years of 1933 (plaintiffs' exhibits 169, 170-173, 316-318 and 436 of the first case). Testimony at the trial indicates that the Eden Isles area restored itself to a vast wildlife resource, and estuary, and Louisiana wetlands, (transcript pages 113-119, 129-130, 146-150, 174-180, 257-265, 290-296, 1132-1134 of the first case). In 1962, the St. Tammany Parish Police Jury became the governing authority of Drainage District No. 2. During this time the St. Tammany Parish Police Jury began to construct the levy system and to dike and drain the Eden Isles area (Special Master's findings 1/10/75 No. 12 of the first case). However, the St. Tammany Parish Police Jury

failed to obtain permits from the United States Corps of Engineers for the levee system between Salt Bayou and Highway 11 on the north shores of Lake Pontchartrain in the Eden Isles area (Plaintiffs' exhibit 59 of the first case). The Special Master found that the land is now dry ground (Special Master's finding of 1/10/75 No. 3 of the first case). However, aerial photographs taken in October of 1974 show that the eastern portion of Eden Isles was still under water (Plaintiffs' exhibit 279-298 of the first case). Color slides taken in October of 1974 show areas of the eastern portion of Eden Isles as under water. These slides also show work being performed on the eastern portion of Eden Isles, consisting of cutting canals, dumping spoilage into Lake Pontchartrain, dredging, and maintainence of a levee system (Plaintiffs' exhibits 319 et seq. of the first case). There is no evidence of permits for the eastern portion of Eden Isles. And the permit issued by the Corps of Engineers to Leisure, Inc. on March 9, 1973 covered only the entrance canal, and did not include the interior canal system, and specifically excludes the eastern portion of Eden Isles (Plaintiffs' Exhibit 229 of the first case). The eastern portion of Eden Isles, which is totally undeveloped was and is the subject of this lawsuit whereas the western portion of Eden Isles on which a permit had been issued was the subject of the first lawsuit. That alone should have been sufficient to prevent dismissal of this case on the basis of res judicata.

A review of the entire record of the first case will clearly show that the court was very much impressed by the fact that Leisure, Inc. in developing the western portion of Eden Isles had expended since their acquisition of the property in January of 1969, twenty-six million dollars for land acquisition, engineering, land fill, sewers, sewer treatment facilities, pumping stations, water facilities, streets, bulkheads, bridges,

maintainence, and most important of all advertising. Leisure, Inc. advertised the sale of lots in Eden Isles West beginning around January or February of 1970 and through the methods of newspaper, television, radio, brochures, pamphlets, magazines and billboards had expended $853,626.91 through September of 1974 (first supplemental Special Master's findings Page 8 of the first case).

VI.

STATEMENT OF THE ARGUMENT OF LAW

It is the petitioners' position that the effect of the ruling of the District Court on January 23, 1975 as reinstated by its judgment of February 20, 1975 insofar as it was based totally on the theory of laches, related only to the completed residential developments of Mariner's Village and Eden Isles West as they were the only substantially completed developments on which large sums of money were spent. Indeed, as has already been pointed out, in its ruling the court stated that "any further work that might be contemplated by defendants or third parties at either development *is unaffected by this opinion*," and would of course proceed in accordance with all applicable laws *and would be subject to review in the courts.*" [Emphasis added, taken from page 124 of the record of the original case.]

It must be noted that this ruling did not include Eden Isles East for the reason that this tract had not yet been developed, nor was judgment rendered on the issues of:

1 - Land within the Eden Isles area is part of the MPCB ecosystem; [the MPCB ecosystem is the chain of lakes Maripas, Lake Pontchartrain,

Lake Catherine and Lake Borne which connect the interior of the State of Louisiana and its wetland areas, the most fruitful perhaps in the entire United States of America to the Gulf of Mexico;

2 - No permits or authorization exist for the construction of the levees surrounding the Eden Isles area, or their subsequent maintenance and revitalization;

3 - With respect to the leveeing, dredging, pumping and related activities in the Eden Isles area:

a - No public hearings were held;

b - No environmental impact statement was prepared; and

c - Permits have not been obtained under the Federal Water Pollution Control Act and the Rivers and Harbors Act.

4 - The alleged illegal dredging, leveeing, pumping and related activities constitute a pattern and practice resulting in destruction of wetlands and waterbottoms in the MPCB ecosystem; and

5 - Governmental entities are failing to enforce the law in the MPCB ecosystem by permitting such dredging, leveeing, pumping and related activities; and

6 - The issuance of permits for dredging and filling in the eastern portion of Eden Isles is contingent upon a regional cummulative environmental impact statement, and under proper permits under the Rivers and Harbors Act of 1899, the Refuse Act of 1899, the Fish and Wildlife Coordination Act, and the Water Quality Improvement Act.

In order for the doctrine of res judicata to apply as a bar to this suit, three requirements must be met: first, the parties to both suits must be identical; second, the cause of action must be identical; and third, judgment in the prior suit must be dispositive of the merits of the case.

Although the parties to both suits are very similar, essentially the same as was pointed out by the Judge in his judgment of January 23, 1975 and also by his instructions to the plaintiffs during the initial proceedings in this case, the other parties who purchased the land as well as the State of Louisiana who clearly have an interest in the land and may in fact be the owners of the land should have been a party to this proceeding and accordingly the parties are not identical.

Secondly, the cause of action is clearly not identical because the first lawsuits were specifically involving the developed portions of Eden Isles which is Eden Isles West, a portion of land comprising of approximately 3,000 acres which is divided clearly from the eastern portion of Eden Isles which contains approximately 2,300 acres by the Interstate 10 Highway. The permit issued by the Corps of Engineers did not include the eastern portion of Eden Isles and all of the facts, most particularly the money that was spent and upon which the issue of prejudice and laches obviously

must have been based in no way included the eastern portion of Eden Isles.

And thirdly, and perhaps most important of all, the judgment in the prior suit must be dispositive of the merits of the case. The theory upon which the defendants have proceeded successfully so far is simply that there was a judgment, it became final, the petition in the original suit contained facts and a prayer for relief which would have included everything had it been disposed of on the merits, and therefore because that judgment based on a petition praying for everything which could conceivably or should conceivably have been prayed for to gain ultimate relief is therefore a final judgment and therefore is res judicata to every single issue which was raised in the petition even though there was never a trial on the merits and every single issue, in fact most issues raised in the petition were never even considered and certainly not disposed of.

It is petitioners' position that the issue of laches or the legal theory of laches by its very nature does not deal with the merits of any particular case. In fact, it solely bars relief being granted on the basis of failure of the plaintiffs to move quickly enough so that prejudice would be encountered by the defendants and they would be unfairly treated if the court were to deal with the substance the facts that is the merits of the case. Certainly, if this lawsuit had involved the western portion of Eden Isles the claim of res judicata would have been totally justified. In fact, because it deals with the totally undeveloped eastern portion of Eden Isles, it is totally unjustified not at all authorized by law, and the Fifth Circuit Court of Appeals and the United States District Court for the Eastern District should be advised by this court to proceed with hearing the merits of the case.

This of course is not a new principle. As this court, that is the United States Supreme Court stated in *Cromwell v. Sac*, 94 U.S. 351 (1876) at page 352, 353:

> . . .There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as in estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. . .
>
> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. . .

From the standpoint of res judicata, perhaps the issue or the statement of law is more clearly stated in the case of *Warren Company v. Neel*, 284 F. Supp. 203, page 210 (1968) in which the court said that for a judgment "to bar the claim of plaintiff on the grounds of res judicata, there must have been a decision on the merits of the claim asserted by plaintiff." The court went on the hold that the general rule of res judicata, as applicable in the case at bar was set forth in reinstatement of law, judgments, Section 49, page 193, which reads as follows:

> Where avowed and final personal judgment not on the merits is rendered in favor of the defendant,

> the plaintiff is not thereby precluded from thereafter maintaining an action on the original cause of action and the judgment is conclusive only as to what is actually decided.

In this case, the District Court's ruling in the prior actions specifically stated that "the matter did not reach trial on the merits, and accordingly the Special Master made no findings or conclusions as to whether the projects required or have been developed with federal permits, an environmental impact statement are in accordance with applicable federal law." [Emphasis added, page 123 of the record of the original case.] Accordingly, a judgment rendered on any grounds which do not involve a trial on the merits may not be used as the basis for the operation of the doctrine of res judicata, such a judgment cannot preclude a subsequent action brought in a way to avoid the objection which prove fatal in the prior action, and the District Court in dismissing the latter action and the Fifth Circuit Court of Appeal in affirming that dismissal erred. Accordingly, those judgments should be reversed and the matter remanded to the trial court for addition of the proper parties and a hearing on the trial on the merits.

CERTIFICATE

I, PLAUCHE F. VILLERE, JR., Attorney for Plaintiffs-Appellants, and a member of the Bar of the United States Supreme Court do hereby certify that on this 16th day of July, 1979, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the attorneys of record for defendants-appellees.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SAVE OUR WETLANDS, INC. (SOWL) ET AL	CIVIL ACTION
	NO. 74-2919
VERSUS	
	SECTION "H"
UNITED STATES ARMY CORPS OF ENGINEERS, ET AL	

SPECIAL MASTER'S REPORT AND RECOMMENDATION

Pursuant to the Order of Reference of Honorable R. Blake West, United States District Judge, dated November 5, 1974, hearings were held November 14, 15,18,21,22,25 and 26, 1974.

The Parties

On October 29, 1974, SAVE OUR WETLANDS, INC. (hereinafter SOWL) and FRANCOIS JELALIAN "[o]n their own behalf and on behalf of all those people whose beneficial rights and interests in subaqueous lands, tidal marshes, tidal waters and related natural resources are being irreparably diminished, permanently damaged and destroyed by indiscriminate dredging and filling and other deleterious activities in and

around the North Shores of Lake Pontchartrain, St. Tammany Parish, Lakes Maurepas, Pontchartrain, Catherine and Borgne (MPCB) eco system; and on behalf of all those peopled who are entitled to the full benefit, use and enjoyment of their environment free from damage caused by the failure of certain Federal, State and local government agencies to prohibit the filling, dredging and other activities adversely affecting the subaqueous lands, tidal marshes, tidal waters and related natur l resources of the Lakes Maurepas, Pontchartrain, Catherine and Borgne (MPCB) eco-system; and on behalf of all those entitled to the full benefit, use and enjoyment of the unique natural resources of the United States and the Lakes Maurepas, Pontchartrain, Catherine and Borgne eco-system in which plaintiffs reside; and on behalf of all those similarly

situated" filed a forty-nine page complaint for "Declaratory and Injunctive Relief and for Damages" against thirty-seven defendants.

PLAINTIFFS allege that they represent a broad class of people, and included as plaintiffs are "Rangia cuneata (clam), Acartia Tonsa (copepod) Rhithropanopeus Harrisii (crab), Anchoa mitchilli (bay anchovy), Brevoortia patronus (Gulf menhaden), Micropogon undulatus (silver perch), Cynoscion arenarius (san seatrout), Arius felis (sea catfish), Menidia berylina (silverside), Leiotomus xanthrus (spot), Pogonias cromis (black drum), Archosargus probatocephalus (sheepshead), Cynoscion nebulosus (speckled trout), Paralichtys Lethostigma (southern flounder), and Sciaenops ocellata (red fish)." Plaintiffs also bring this action "on behalf of their brother-plaintiffs of the sea, bayous, marshes, cane reeds,

minnow ponds, and potholes," and allege "[t]hese plaintiffs are the alligator gars, green trout, perch, sac a lait, Louisiana bull frogs, mullet, crabs, shrimp, flounder, red fish, speckle trout, croakers, drums, jack fish, sheepshead, white trout. These plaintiffs are the creatures of the air, wild white egrets, poule d'eau, dos-gris, canvasback, pentails, French duck, American Goldeneyes, Buffleheads. And on behalf of the scavangers of the soaky marshes, the nutria and muskrats. And on behalf of the endangered species, American Osprey, Southern Bald Eagle, greater sandbill crane and American Alligator."

Defendants include the UNITED STATES ARMY CORPS OF ENGINEERS (hereinafter CORPS); two unknown agents of the CORPS; seven CORPS officers individually and in their official capacities; general counsel and the Chief and District Chief of Construction operations of

the CORPS; the SECRETARY OF THE ARMY, the ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY and the REGIONAL ADMINISTRATOR; the SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAND DEVELOPMENT and the ADMINISTRATOR, all in their individual and official capacities; the DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT: ST. TAMMANY PARISH, LOUISIANA, POLICE JURY (hereinafter POLICE JURY), as the governing body of the PARISH and of DRAINAGE DISTRICT NO. 2; the eleven members of the POLICE JURY; the DISTRICT ATTORNEY andhis assistant, both individually and in their official capacities, and four business corporations: BRADLEY-McDONALD CORPORATION (hereinafter BRADLEY-McDONALY); LEISURE, INC. (hereinafter LEISURE); FIRST FIDELITY MORTGAGE COMPANY (hereinafter FIRST FIDELITY), and PALOMAR FINANCIAL BOUND, also known as PALOMAR FINANCIAL, INC.

(hereinafter PALOMAR).

With their complaint, plaintiffs filed with the Clerk of Court 396 exhibits, including a photographic slide projector. None of the exhibits was served on any named defendant.

Thirty-seven pages of interrogatories were filed with the complaint addressed in varing numbers to various defendants.

Jurisdiction

Jurisdiction is alleged to arise under:

1) 28 U.S.C. § 1343 (3) and (4).

2) 42 U.S.C. 1983.

3) 28 U.S.C. 1337

4) Article VI, Section 2 of the United States Constitution.

5) The Fifth, Ninth and Fourteenth Amendments.

6) The National Environmental Policy Act of 1969 (hereinafter NEPA), 42 U.S.C. 4331, et seq.

7) Article I, Section 8 of the Constitution.

8) The Fish and Wildlife Coordination Act, 16 U.S.C. 661, et seq.

9) The Rivers and Harbors Act of 1899, 33 U.S.C. 403.

10) The Refuse Act of 1899, 33 U.S.C. 407

11) 28 U.S.C. 1361.

12) The Interstate Land Sales Act, 15 U.S.C. 1701.

13) The Administrative Procedure Act, 5 U.S.C. 702(a).

14) Executive Order No. 11514, 35 Federal Register 4247.

15) The Federal Water Pollution Control Act as Amended 1972, 33 U.S.C. 1151 et seq., and

16) "[T]he concepts of justice, due process, and equity as established in the traditional and ancient principles of natural law."

Plaintiffs seek declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

Temporary Relief

By separate motion, also filed October 29, 1974, plaintiffs sought a temporary restraining order against three of the corporate defendants: LEISURE, FIRST FIDELITY and PALOMAR. at 5:00 P.M., October 31, 1974, the Court temporarily restrained those defendants from conducting any dredging and pumping operations on the northern shores of Lake Pontchartrain, east of Interstate Highway 10 in the area designated as the eastern portion of EDEN ISLES. The Order was to take effect from the time plaintiffs posted security in the nominal amount of $5,000.00. A hearing on plaintiffs' motion for preliminary injunction was set November 5, 1974, at 9:00 A.M.

Security was never posted by plaintiffs, and, accordingly, the temporary restraining order never became effective.

On November 4, 1974, the hearing was

continued by Judge West to November 8, 1974, because all defendants had not been served with notice.

On November 5, 1974, Judge West ordered the issues raised by plaintiffs' motions for preliminary and permanent injunctions referred to the undersigned "to conduct such conferences and hearings and enter such orders as may be necessary in the premises," and ordered hearings to commence at 10:00 A.M. November 14, 1974.

On November 14, 1974, counsel for plaintiffs and all parties served with a copy of the complaint concurred in the reference to the Special Master, and executed and filed in the record their consent and waiver.

Numerous motions, including motions to dismiss, were filed in limine, including improper service of process and lack of

jurisdiction over individual defendants.

By stipulation, counsel for plaintiffs withdrew from the record the 396 exhibits filed with the complaint, dismissed without prejudice the complaint as to each individual federal employee defendant and defendants FIRST FIDELITY and PALOMAR; bifurcated the proceeding severing the issues of injunctive relief and declaratory judgment from those of damage alleged to arise under 42 U.S.C. 1983; agreed to proceed first on the jurisdictional issue of standing of plaintiffs to sue and the defense of laches raised by the defendants as both issues affected all parties, and finally to try the merits of the preliminary injunction separately as to defendants BRADLEY-McDONALD and LEISURE.

The Projects

The projects sought to be enjoined both

lie on the north shore of Lake Pontchartrain in St. Tammany Parish, Louisiana. They are MARINER'S VILLAGE, a development of defendant BRADLEY-McDONALD, which is nestled between the Lake Pontchartrain Causeway and the Prestress Concrete Plant, and EDEN ISLES, alleged a development of LEISURE, which is bounded on the west by U.S. Highway 11, on the east by Salt Bayou, and divided by Interstate Highway 10 into EDEN ISLES EAST and EDEN ISLES WEST. The projects are about twenty-five miles apart, and are separated by the town of Mandeville, Louisiana, and a vast area of still undeveloped wetlands.

Each project is a residential subdivision designed around interior canal systems that find or will find their outlet into Lake Pontchartrain.

Development of EDEN ISLES WEST began in 1970, and it is inhabited by approximately

fifty families. EDEN ISLES EAST is yet undeveloped.

The Pleadings

The complaint is a complex and involved pleading, broad, general and vague in its allegations and difficult to summarize. Its 39th paragraph begins a "General Chronicle and Causes of Action." In support of various allegations, plaintiffs refer to scores of unnumbered and otherwise unidentified exhibits.

Essentially, plaintiffs contend that Lake Maurepas, Pontchartrain, Catherine and Borgne comprise a single ecological unit, referred to as the MPCB estuary, that a "regional, cumulative, environmental impact study" is essential, and that there should be a moratorium on "developments affecting" the unit for at least thirty months, presumably to permit completion of such a study. They allege that the CORPS disregards the need for

study and issues permits arbitrarily and capriciously for developments which will cause immediate and irreparable damage to plaintiffs, principally in loss of commercial and sport fishing and hunting.

Plaintiffs allege that EDEN ISLES comprises approximately 6,000 acres; that it was once wetlands in the MPCB estuary; that in 1927 Drainage District No. 2 was created in St. Tammany Parish; that the area was drained without a permit under the Rivers and Harbors Act of 1899; that during the depression the Drainage District defaulted in its bond obligation, and the area returned to its original condition as wetlands. Further, that during 1963, the St. Tammany Parish Police Jury became the governing body of the Drainage District. The area was again drained without a permit, and in June, 1972, the Police Jury

entered into an agreement with LEISURE for development of the area.

Prior to or during a hurricane September 7, 1974, plaintiffs allege, the Drainage District's levee or dike in EDEN ISLES EAST broke, and again without first obtaining a permit from the CORPS, repairs are being made to the levee and the area pumped dry.

Plaintiffs also allege considerable development of EDEN ISLES WEST, including thirteen miles of interior canals for which no permit was issued. A permit was issued by the CORPS to LEISURE without an Environment Impact Statement (EIS) March 9, 1973, for dredging and maintenance of an entrance channel from the Yacht Basin in Grand Lagoon to Lake Pontchartrain, based upon the conclusion of the CORPS' District Engineer that

environmental statement was not required. Plaintiffs allege that the issuance of the permit under such conditions is illegal.

The DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, plaintiffs contend, violated the Interstate Land Sales Act in failing to require an EIS.

Plaintiffs admit the December 20, 1973, issuance of a dredge and fill permit by the CORPS, following public hearing, to defendant BRADLEY-McDONALD for an entrance channel to Lake Pontchartrain at MARINER'S VILLAGE, but allege the CORPS acted arbitrarily and capriciously in issuing the permit without an EIS.

Injunctive Relief Sought

Plaintiffs seek:

1) To enjoin and revoke any permits issued to LEISURE, INC. for dredge and fill operations

in EDEN ISLES WEST.

2) To enjoin the POLICE JURY, LEISURE and the CORPS from dredging, depositing spoil, cutting interior canals "in violation of Section 10 of the Rivers and Harbors Act of 1899."

3) To enjoin the POLICE JURY, LEISURE and the CORPS "from destroying . . . the eastern undeveloped protion of Eden Isles."

4) To enjoin the CORPS from issuing permits to LEISURE for dredge and fill in the eastern portion of EDEN ISLES.

5) To enjoin and order the POLICE JURY to remove all dikes around both EDEN ISLES EAST and WEST.

6) To enjoin the POLICE JURY from charging 50¢ per copy of records and documents pertaining to Drainage District #2.

7) To enjoin LEISURE and the POLICE JURY from "bulldozing, dredging, trucking, pushing mud and blocking levees and dykes; cutting interior canals, constructing apartment complexes, bulldozing, dragging poles on the North Shores of Lake Pontchartrain."

8) To enjoin construction by BRADLEY-McDONALD until an EIS is prepared; and

9) To enjoin the CORPS from refusing to include interior canal systems within their permit jurisdiction.

Other relief sought by plaintiffs include long-term cumulative scientific studies of the MPCB eco system by persons appointed by the Court, declaratory relief, and damages.

EDEN ISLES

At the hearings certain defense witnesses were presented out-of-turn and before the close of plaintiffs' case by agreement of the parties

for their convenience and that of the witnesses. Defendants reserved their rights to present appropriate motions at the close of plaintiffs' case without consideration of this testimony. At the close of plaintiffs' case the defendants moved to dismiss plaintiffs' motion for preliminary relief, and this motion was granted. The following fingings of fact, conclusions of law, and recommendations with regard to the EDEN ISLES aspect of the case are based on the testimony of the witnesses and other evidence offered by plaintiffs which the Court found insufficient to justify preliminary relief. Because defendants did not have an opportunity to fully present their evidence, and because plaintiffs have not had an opportunity to offer rebuttal evidence, and in accordance with the reservations made when the evidence was offered out-of-turn, the

the Court has not considered this evidence; however, the Court will, of course, consider this testimony if it becomes appropriate in the future course of this litigation.

Findings of Fact

1.

EDEN ISLES is an area on the northern shores of Lake Pontchartain and is bisected by Interstate Highway 10 into areas commonly known as EDEN ISLES WEST and EDEN ISLES EAST.

2.

No evidence was presented as to the ownership of EDEN ISLES or any protion thereof.

3.

A portion of EDEN ISLES WEST has been under development as a residential subdivision arranged around an interior canal system since approximately 1970.

4.

Plaintiffs offered no evidence of the extent or character of the development at EDEN ISLES; however, the on-side inspection by the

Special Master revealed that the interior canal system associated with the project is virtually complete except for the completion of the installation of concrete bulkheads in certain of the existing canals, that streets are laid and approximately 50 houses are built and apparently occupied. A golf course is also under construction.

5.

This interior canal system is connected to Lake Pontchartrain through Grand Lagoon.

6.

A permit under Section 10 of the Rivers and Harbors Act of 1899 was issued to LEISURE, INC. by the CORPS OF ENGINEERS for certain dredge and fill operations in the EDEN ISLES area; however, the permit was offered into evidence, and the Court does not know the nature of the work authorized by the permit, the area

covered, or any other terms of the permit.

7.

No public hearings were conducted by the CORPS prior to the issuance of the permit, and no Environmental Impact Statement within the meaning of Section 102 of the National Environmental Policy Act of 1969 was prepared.

8.

In approximately 1927, the area now known as EDEN ISLES was enclosed with dikes and levees and pumped dry; however, this system was not maintained during the depression years, and the area reflooded.

9.

In the years after this flooding, the area now known as EDEN ISLES was abundant with soft shell crabs, shrimp, and certain species of game birds, and was commercially fished by various persons, including some members of SOWL and

their families.

10.

The area now known as EDEN ISLES was redrained in 1963, and has not supported the wildlife which formerly inhabited the area and has not been commercially fished by members of SOWL or anyone else since that time.

11.

The testimony of plaintiffs' expert witnesses is that Lake Pontchartrain forms part of an ecological unit comprising Lakes Maurepas, Pontchartrain, Catherine and Borgne.

12.

Plaintiffs offered the testimony of several experts. The Court was most impressed by Dr. John W. Day, Jr., who was qualified as an expert in Marine Ecology and Marine Biology.

13.

As a scientist, Dr. Day considers an

estuary to be a natural ecological system which must be viewed as a unit and that every unnatural activity introduced into or removed from it has some effect upon it.

14.

Although it is Dr. Day's opinion that dredging of channels into Lake Pontchartrain could have an effect upon the ecological unit, he does not consider EDEN ISLES as a major project that will by itself have any measurable effect upon the estuary and concedes that there is no scientific evidence of any activity on the north shore of Lake Pontchartrain that has had a significant detrimental effect upon the ecology in St. Tammany Parish.

15.

John E. Burgess, Jr., biologist in charge of the Lafayette, Louisiana, office of the United States Fish and Wild Life Service and qualified

as an expert in aquatic biology and fishery biology, has had most of his experience with developments involving canals in the State of Florida, where soil conditions for such projects are less favorable than the Lake Pontchartrain area.

16.

Mr. Burgess believes that the exchange of water between the canals of EDEN ISLES and Lake Pontchartrain will have some minor effect in the Lake but that dilution makes that effect so small it could not be found. His best estimate of the time when adverse ecological conditions could occur in the canals was between 5 and 30 years.

17.

Thomas L. Bradley, a water pollution control biologist for almost eight years, employed by the Louisiana Wild Life and Fisheries Commission, was called by the plaintiffs, and over the objection of plaintiffs was qualified in his specialty as an expert by the Court. Mr. Bradley testified that he has investigated fish kills within the levee of EDEN ISLES WEST after a portion of the levee had sloughed off and water had been allowed to enter. He found 50 to 55 dead crabs and fewer dead fish. His investigation was at the request of Mr. Fontana, plaintiffs' counsel.

18.

Mr. Bradley was of the opinion that the canals of EDEN ISLES will have little effect upon the waters of Lake Pontchartrain for the reason that he does not believe that the waters of the canals will mix with the waters of the Lake.

19.

Dr. Paul H. Templet qualified as an ex-

pert in water pollution control chemistry and coastal zone management.

20.

Despite the fact he has never performed any studies in the region, Dr. Templet is of the firm opinion that the MPCB eco system is under such "stress" that it is on the verge of collapse. He testified, however, that the degree of stress is unknown and it cannot be assessed until a cumulative study of the entire eco system can be completed.

21.

There is no evidence that plaintiffs will suffer irreparable injury as a result of the action of these defendants if a preliminary injunction is not granted.

Conclusions of Law

This suit arises under the Administrative

Procedure Act, 5 U.S.C. §551, et seq., the National Environmental Policy Act. 42 U.S.C. §4321, et seq., and other federal laws cited by plaintiffs' complaint.

2.

This Court has jurisdiction of the subject matter by virtue of 28 U.S.C. §1331 and 5 U.S.C. §§ 701-706.

3.

Injunction is an extraordinary remedy rooted in equity, and the grant or denial of a preliminary injunction addresses itself to the sound discretion of the trial court. Wright & Miller, Federal Practice and Procedure: Civil §§ 2947 & 2948; Johnson v. Radford, 5th Cir. 1971, 449 F.2d 115; Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, 5th Cir. 1971, 441 F. 2d 560. But, as most recently expressed by Judge

Thornberry, "[t]he district court does not exercise unbridled discretion." Canal Authority of State of Florida v. Callaway, 5th Cir. 1974 489 F. 2d 567.

> "It must exercise that discretion in light of what we have termed 'the four prerequisites for the extraordinary relief of preliminary injunction.' Allison v. Froehlke, 5 Cir. 1972, 470 F. 2d 1123, 1126. The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to plaintiff outweights the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest."
>
> 489 F. 2d at p. 572

Moreover, a preliminary injunction "should not be granted unless the movant carries the burden of persuasion." 489 F. 2d at p. 573 and p. 576.

Plaintiffs have failed to carry even the

most meager burden of proof of any damage that will befall them as the result of the action or inaction of any defendant such as would justify the extraordinary relief of preliminary injunction.

4.

Plaintiffs have failed to demonstrate that there is (1) a substantial liklihood that plaintiffs will prevail on the merits; (2) a substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to plaintiffs outweighs the threatened harm the injunction may do the defendants, and (4) that granting the preliminary injunction will not disserve the public interest.

Recommendation

Accordingly, I recommend that plaintiffs' complaint seeking preliminary injunction against

defendants UNITED STATES ARMY CORPS OF ENGINEERS; the SECRETARY OF ARMY; the ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY and his REGIONAL ADMINISTRATOR; THE SECRETARY OF THE DEPARTEMTN OF HOUSING AND URBAN DEVELOPMENT and his ADMINISTRATOR; THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; the ST. TAMMANY PARISH POLICE JURY and its individual members; DISTRICT ATTORNEY WOODROW W. ERWIN and his ASSISTANT JULIAN RODRIGUE of ST. TAMMANY PARISH; and LEISURE, INC., be denied.

Respectfully submitted,

New Orleans, Louisiana, December 19, 1974.

MOREY L. SEAR
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SAVE OUR WETLANDS, INC. (SOWL) ET AL	CIVIL ACTION
	NO. 74-2919
VERSUS	
	SECTION "H"
UNITED STATES ARMY CORPS OF ENGINEERS, ET AL	

FIRST SUPPLEMENTAL SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

Pursuant to an Order of Reference of Honorable R. Blake West, United States District Judge, trial on the merits of plaintiffs' application for preliminary injunction was held. By agreement of counsel, the issues relating to the projects of defendants BRADLEY-McDONALD CORPORATION (hereinafter BRADLEY-McDONALD) and LEISURE, INC. (hereinafter LEISURE) were tried separately.

All issues relating to BRADLEY-McDONALD and including the defense of laches were fully litigated November 14,15,16 and 18, 1974, and

resulted in a recommendation by the Special Master that plaintiffs' suit against BRADLEY-McDONALD be dismissed on account of laches.

Following presentation of plaintiffs' evidence, the remaining defendants moved for a directed verdict pursuant to Rule 50(a), Federal Rules of Civil Procedure, which motion was granted for the reasons set forth in the Special Master's Report and Recommendation of December 19, 1975.

Thereafter, counsel agreed to try the defense of laches as to all remaining defendants on January 3, 1974, and that all testimony pertinent to that issue already heard by the Court including defense witnesses heard out of turn at the trial of the merits of preliminary injunction should be considered by the Court.

Based upon the testimony of the witnesses

and the evidence introduced at the trial, I now make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1.

All of the property involved in this portion of the suit and developed by LEISURE is located in St. Tammany Parish Drainage District Number 2, on the north shore of Lake Pontchartrain.

2.

St. Tammany Drainage District Number 2 was created pursuant to Article XV, Section 1, of the Louisiana Constitution and Acts of the Louisiana Legislature, which confer upon Parish Police Juries the authority to create drainage districts for the purpose of reclaiming marsh lands. Pursuant thereto, the St. Tammany Police Jury enacted an ordinance, dated November 10,

1925, creating St. Tammany Parish Drainage District No. 2 and appointing the first Board of Commissioners [EXHIBIT P.J.2-A].

3.

Thereafter, the Drainage District began planning the drainage of the area within its territorial confines, and a map showing the location of levees, canals, pumping stations, and roads was prepared on December 18, 1926 [EXHIBIT P.J. 1].

4.

An assessment roll covering property within the Drainage District was prepared on November 13, 1925 [EXHIBIT P.J. 3].

5.

A Board of Appraisers was appointed, to prepare a report assessing the benefits to be derived by persons owning property within the district. This report was confirmed by the decree the Twenty-Second Judicial District Court,

Docket No. 4672, dated May 13, 1927 [EXHIBIT P. J. 2-B]. Thereafter, taxes were levied by the Drainage District on May 16, 1927 and June 29, 1927 [EXHIBITS P.J.2-C and 2-D].

6.

By resolution of the Board of Commissioners of St. Tammany Drainage District Number 2, dated July 16, 1927, $440,000 of construction bonds were authorized [EXHIBIT P.J. 2-E], and an additional tax was levied against property in the District on July 23, 1928 [EXHIBIT P.J. 2-G].

7.

An additional $33,000 of construction bonds was authorized by a resolution dated August 27, 1928 [EXHIBIT P.J. 2-G].

8.

Subsequently, improvements were undertaken by the Board, including construction of a caretaker's residence [EXHIBIT P.J. 4], a pumping station, drainage canals, and levees [EXHIBIT

P.J. 6].

9.

The Board of Appraisers was active in 1933 [EXHIBIT P.J. 2-H].

10.

During the Great Depression of the 1930's the Drainage District was inactive, and its facilities and levees suffered deterioration.

11.

In 1953 the Drainage District's bonds were placed in default, and the bondholders secured a default judgment against the District. [EXHIBIT P.J. 7]. This judgment was subsequently satisfied by the United States Marshal's sale of all the property within the Drainage District [EXHIBIT P.J. 8].

12.

In 1962, the St. Tammany Parish Police Jury was constituted as the governing body of the Drainage District. [EXHIBITS P.J. 11-A and 11-B].

13.

In February, 1963, an engineering report for the rehabilitation of the District was prepared [EXHIBIT P.J. 9]. A map was also prepared, showing the layout of levees, canals, the pumping station, I-10, and various other features of the District, which were planned or already in existence [EXHIBIT P.J. 10].

14.

Thereafter, bonds were authorized and issued, various contracts let, taxes levied and assessed, bids advertised and accepted, and other action was taken authorizing the issuance of $330,000 of bonds in July, 1965 [EXHIBIT P.J. 13], and $310,000 of drainage bonds in January, 1966 [EXHIBIT P.J. 14].

15.

Taxes were levied against the property, commencing in 1963 [EXHIBIT p.J. 15]

16.

Numerous contracts for the rehabilitation of the District, including road reconstruction, pumping station repairs and improvements and other matters, aggregating almost $2,000,000 were let between August 21, 1963, and May 16, 1966 [EXHIBIT P.J. 17].

17.

Maps were prepared showing the location of the levees and canals necessary to restore the District to a fully-drained condition [EXHIBITS P.J. 18, 19 and 20].

18.

Mr. Clifford C. Ouder, presently employed as manager of the Drainage District's pumping station and as overseer of the levees, testified that he is 56 years of age and has been familiar with Drainage District Number 2 all his life.

19.

In 1928, at the age of 10, Ouder remembers the area as mostly marsh land, which was diked and drained, and that canals were dug, levees were erected, and a pumping station was built.

20.

Shortly after the area was diked and drained, it was a dry prarie with naked ground and non-marsh type vegetation grew in the area, consisting of broom sage, mongo bushes and roseau bushes. The broom sage was harvested for use as brooms, and some of the area was farmed for varuous vegetable crops.

21.

The area was again drained in 1963; the old levees rebuilt; the canals and drainage ditches cleaned out; the pumping station was renovated, and by 1965 or 1966 the area was completely dry again.

22.

The canals, levees, and pumping station have been continyously maintained since renovation was completed in 1965 or 1966.

23.

All of the ground in both Eden Isles East and West is now dry ground and has been since 1963.[1] The area no longer exists in its original natural state and is either substantially developed or prepared for development.

24.

LEISURE's property within the St.Tammany Drainage District Number 2 consisted of 5,300 acres and was divided by Interstate Highway 10. The 2,300 acres of the LEISURE development east of I-10 is referred to as Eden

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1 After Hurricane Carmen, in September, 1974, there was a bread in the levee in Eden Isles East, which was repaired in three to four weeks.

Isles East, and 3,000 acres on the west of I-10 is referred to as Eden Isles West.

25.

LEISURE acquired what is know known as Eden Isles East and West in January, 1969. Since then, Leisure's costs to develop Eden Isles have exceeded $26,000.00 for land acquisition, engineering, land fill, sewers, sewer treatment facilities, pumping stations, water facilities, streets, bulkheads, bridges, maintenance, and advertising.

26.

One portion of Eden Isles West, consisting of about 1,400 acres, has been developed by a canal system, with about 1,400 to 1,500 lots bodering on the canals. Almost all of the lots bodering on the canals have been sold to individual purchasers, and neither EDEN ISLES nor LEISURE has any ownership interest in that property. About 52 homes have already been

constructed in the area. About 900 acres remain in the Western portion.

27.

Thomas Edwin Patton was first employed by LEISURE in June, 1970, as the vice-president responsible for the Eden Isles development. He became president in March, 1971 and remained with LEISURE until February 15, 1974.

28.

When Patton arrived in June, 1970, the perimeter canal had been constructed on the west side. As of October 31, 1970, shortly after he arrived, LEISURE had expended a total of $5,500.00 on the project, including land acquisition.

29.

Construction of the perimeter and interior canal system in the western protion of Eden Isles was begun in 1969 and completed by March,

1973. Development of EDEN ISLES was progressing virtually every day; and during the period 1970 through 1973, work was carried on 24 hours a day.

30.

The excavation contractor used six to nine draglines and four to six bulldozers at a time. One dragline had a boom 110 feet long that could be seen five miles away. At times there were two dredges on the job. The equipment was lighted at night, and the large draglines had lights on them. The dredges worked 24 hours a day and were lighted "extremely well" and looked like "floating cities'.

31.

The work was visible in the day time and at night, from both Highway 11 and Interestate 10.

32.

Work completed in Eden Isles as of Dec-

ember 26, 1974, was:

Unit 1 and 1A	99%
Unit 2 and 2A	99%
Unit 3	99%
Unit 4	53%
Unit 5	21%

[EXHIBIT L-159].

33.

A golf course, 90% completed, is located in the northern portion of EDEN ISLES WEST.

34.

Eighteen miles of canals have been dug, and no further canal work is contemplated. All that remains is the completion of the work already started on the streets, sewer system, and water systems, and completion of the bulkheading of canals which have already been dug.

35.

LEISURE owns about thirty percent of the land in EDEN ISLES EAST. The rest of the land

has been sold, or is under option, to others. LEISURE has no intention of doing any dredging or excavation on the East side, and the only work that LEISURE has performed on the East side has consisted of the maintenance of levees.

36.

LEISURE has incurred costs with respect to the East side which total about $739,000 over and above LEISURE's own land acquisition costs.

37.

LEISURE's sales of property on the East side have totaled over $4,000,000.

38.

About 800 to 900 lots and other property, totaling over $18,000,000, have been sold by LEISURE subject to LEISURE's meeting certain improvement and construction obligations with respect to roads, sewerage, water, streets, bulkheads and drainage. These property owners are not parties to this litigation.

39.

LEISURE's financing has been suspended pended the outcome of this suit.

40.

LEISURE paid drainage district taxes every year amounting to about $200,000, on drainage district bonds and assessments, and in addition, LEISURE paid ad volorem taxes on the land it owned.

41.

Advertising of the project in the general New Orleans Metropolitan area began around January or February of 1970. The methods of the advertising included newspaper, television, radio, brochures, pamphlets, magazines, and billboards. Through September, 1974, $853,636.91 had been expended [EXHIBIT L-166].

42.

Publicity of the EDEN ISLES development was widspread throughout the Orleans, Jefferson,

and St. Tammany Parish areas, through radio, television, and newspaper articles and advertisements. Over one hundred different news articles and advertisements appeared in newspapers alone.[2]

43.

The progress of the work continuously appeared in newspapers, with advertisements and maps showing the exact location of EDEN ISLES on the northern shore of Lake Pontchartrain, and with offers of tours and promotional

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[2] Numerous articles appeared in the Times-Picayune, the Slidell Century News, the St. Tammany Times, the Century News, Dixie Roto Magazine, the State-Times, Baton Rouge, Louisiana, New Orleans Magazine, Accolade (Magazine of Slidell area), Greater Slidell Area Housing Guide, and the special Eden Isles publication "Eden Isles Currents".

campaigns.

44.

As early as March, 1970, newspaper articles began, advertising the advantages of waterfront property on inland canals.

45.

Buddy Broadway, LEISURE's project engineer, prepared and submitted to the CORPS, in October, 1971, LEISURE's initial application for a Section 10 Permit. This initial application covered only the dredging of an entrance channel from lake Pontchartrain into Grand Lagoon. However, the CORPS subsequently requested that LEISURE submit a revised application covering not only the entrance channel, but also the interior canal system and the connecting channel to Lake Pontchartrain.

46.

LEISURE's revised application was prepared and submitted to the CORPS, on February 21, 1972.

This application stated that during the construction of the entire project approximately thirty-six million cubic yards of material would be excavated. The attachments to the permit application show that the entrance channel was to be dredge to ten feet below mean low water. Also attached to the application were subdivision plans for EDEN ISLES EAST and WEST showing the canal systems proposed for each area.

47.

Public notice of LEISURE's revised application was given on or about February 25, 1972, to a large number of individuals and agencies, as well as news media. The public notice described work: "Character of Work: Dredge and maintain and entrance channel from Lake Pontchartrain and a system of connecting canals. All spoil will be placed on property owned by

the applicant and none will be placed in the lake."

48.

Letters of no objection were obtained from the Louisiana Department of Public Works, the Louisiana Stream Control Commission, the Louisiana Wild Life and Fisheries Commission, and the St. Tammany Parish Police Jury.

49.

Patton testified that a no time did he ever receive a letter, telephone call or correspondence of any kind regarding any objection to the project. Patton further testified that he had never received a complaint with respect to the canal system, nor did he ever receive a communication from either the Environmental Protection Agency or the United States Department of Interior directing that work be stopped.

50.

A Section 10 Permit was issued to LEISURE by the COPPS on March 9, 1973, with the concurrence of the Department of Interior, to dredge and maintain an entrance channel, yacht basin, and connecting channel, and install and maintain bulkheads, fills, revetments, culverts, and docks, in Lake Pontchartrain and Grand Lagoon.

51.

In the December 19, 1974, Report of the Special Master, in Finding of Fact Number 6, at page 25, concerning EDEN ISLES, the Special Master found that the Permit issued LEISURE under Section 10 of the Rivers and Harbors Act of 1899 was not in evidence. The Permit dated March 9, 1973, is in evidence as PLAINTIFF EXHIBIT 229.

52.

The March 9, 1973, Permit was issued with-

out an Environmental Impact Statement (EIS).

53.

No evidence was offered of bad faith of any defendant in the course of the development of EDEN ISLES.

54.

Commercial fishermen who are members of SOWL and who live in the vicinity of EDEN ISLES testified that they knew of the original Drainage District No. 2 of the subsequent development of EDEN ISLES, and because of the redraining of the area in 1963 they have been unable to fish there for over ten years.

55.

Mary Halpin, the president of SOWL, testified by deposition that she had been aware of the development of EDEN ISLES for "one or two years." [EXHIBIT G-10, p. 10].

56.

After public notice of LEISURE's permit application on February 25, 1972, and prior to the issuance of the Permit more than one year later on March 9, 1973, neither plaintiff FRANCOIS JELALAIN nor any other member of SOWL made any protest, objection, or comment concerning the Permit or any other aspect of the project to LEISURE, the CORPS, the ST. TAMMANY PARISH POLICE JURY, or any other defendant in this lawsuit.

Conclusions of Law

1.

Defendant have raised a defense that plaintiffs' complaints against them are barred by laches and have presented evidence in support of this defense. A defense of laches can be properly asserted in environmental litigation. Lathan v. Volpe, 9th Cir. 1971, 445 F.2d 1111, 1122; I-291 Shy? Ass'n v. Burns, 372 F. Supp.

223 (D. Conn. 1974); Smith v. Schlesinger, 371 F. Supp. 559 (C.D. Calif. 1974); Centerview/Glenn Avalon Homeowners Ass'n v. Brinegar, 367 F. Supp. 633 (C.D. Calif. 1973); Minnesota Public Interest Research Group v. Butz, 358 F Supp. 584 (D. Minn. 1973); Clark v. Volpe, 342 F. Supp. 1324 (ED La. 1972), aff'd 461 F. 2d 1266; Harrisburg Coalition Against Ruin Envir. v. Volpe, 330 F. Supp. 918 (MD Pa. 1971); Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238 (Md Pa. 1970).

2.

"Laches is determined in the light of all the existing circumstances and required that the delay be unreasonable and cause prejudice to the adversary." Clark v. Volpe, supra; Pennsylvania Environmental Council v. Bartlett, supra; Sobosle v. United States Steel Corporation, 3rd Cir. 1966, 359 F. 2d 7. Laches is not merely a question of time but also a question of the diligence of the

plaintiffs viewed under all the circumstances of the case. Clark v. Volpe, supra; Burnett v. New York Central Railroad Company, 380 US 424, 85 S.Ct. 1050 (1965); Wiley v. United States, 245 F. Supp. 669 (Ed Ill. 1965).

3.

Plaintiffs' suit was filed October 29,1974, considerably after the acts of which they complain were performed. Part of their suit is an attack on the creation of the St. Tammany Parish Drainage District No . 2 which was originally constituted in 1927, and was revitalized in 1963. Work which plaintiffs allege was illegally done without necessary permits was started in 1970. The Permit which plaintiffs allege was illegally issued without an Environmental Impact Statement was publicly noticed February 25, 1972, and was issued March 9, 1973. The work which plain-

tiffs allege was illegally issued without an Environmental Impact Statement was publicly noticed February 25, 1972, and was issued March 9, 1973. The work which plaintiffs seek to enjoin and the development they wish to remove are virtually complete. Plaintiffs' suit is allegedly to protect the character of the area as wetlands, but the area has not had that character for over ten years, and was originally altered in 1927.

Plaintiffs have been aware of the revitalization of Drainage District No. 2 and the development of EDEN ISLES for many years. The project is a relatively large development and is not easily overlooked. The developers have spent over $850,000 in advertising and public relations in an effort to make the porject known to prospective purchasers in St. Tammany Parish and the entire New Orleans

Metropolitan area.

Defendants have been prejudiced by plaintiffs' delay in bringing suit. Public funds have been expanded for the restoration of Drainage District No. 2

LEISURE has invested $26,000,000 in the development of EDEN ISLES. Additionally, members of the general public who are not parties to this suit have purchased land in the area, and many have built homes and have established their families there.

That part of plaintiffs' suit which seeks to enjoin or remove development in EDEN ISLES and ST. TAMMANY PARISH DRAINAGE DISTRICT NO. 2 is barred by laches.

Recommendation

Accordingly, I recommend that that part of plaintiffs' complaint against defendants UNITED STATES ARMY CORPS OF ENGINEERS; the SECRETARY

OF THE ARMY: the ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY and his REGIONAL ADMINISTRATOR: THE SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and his ADMINISTRATOR: THE DEPARTMENT OF HOUSAND AND URBAN DEVELOPMENT: the ST. TAMMANY PARISH POLICE JURY and its individual members; DISTRICT ATTORNEY WOODROW W. ERWIN and his ASSISTANT JULIAN RODRIQUE of ST. TAMMANY PARISH; and LEISURE, INC., which seeks to enjoin or remove development in EDEN ISLES and ST. TAMMANY PARISH DRAINAGE DISTRICT NO. 2 be DISMISSED as barred by laches.

Respectfully submitted,

New Orleans, Louisiana, January 10, 1975.

MOREY L. SEAR
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SAVE OUR WETLANDS, INC. (SOWL) ET AL	CIVIL ACTION
VERSUS	NO: 74-2919
UNITED STATES ARMY CORPS OF ENGINEERS, ET AL	SECTION H

O R D E R

SAVE OUR WETLANDS, INC. (SOWL) and FRANCOIS JELALIAN in their behalf and in behalf of others seeking to preserve the environment along the North Shore of Lake Pontchartrain and its connecting waters brought this action against various federal and state governmental agencies, their directors, certain individuals, and two corporate real estate developers.

Among other things, the suit seeks to enjoin the commerical projects known as MARINER'S VILLAGE, a development of defendant BRADLEY-McDONALD, INC., and EDEN ISLES, a development of LEISURE, INC. and to return them, along with other areas

within the jurisdiction of the ST. TAMMANY PARISH POLICE JURY to their "natural" state, which plaintiffs contend to be wetlands.

The Court ordered the matters relating to injunction referred to a United States Magistrate as Special Master for hearings and to report to the Court his findings of fact and conclusions of law, and to make recommendations to the Court. No objection to the reference was made, and all parties to the proceedings filed in the record a stipulation of consent to the reference.

After careful review of the pleadings, the record, exhibits and evidence, study of the findings of fact, conclusions of law, and recommendations of the Special Master, conferences with him on several occasions, and considering the law applicable to the case, the Court adopts the

Special Master's Report and Recommendation and First Supplemental Report and Recommendation as its opinion.

The matter did not reach trial on the merits, and accordingly the Special Master made no findings or conclusions as to whether the projects required or had been developed with federal permits, Environmental Impact Statements, or in accordance with applicable federal law.

The developments in the projects that arguably require federal permits or Environmental Impact Statements are:

1) At defendant BRADLEY-MCDONALD's MARINER'S VILLAGE, an entrance channel, connecting canal, and harbor area in Lake Pontchartrain in accordance with a plan attached to a permit issued by the UNITED STATES ARMY CORPS OF ENGINEERS dated December 20, 1973 [Bradley-McDonald Exhibit 10].

2) At defendant LEISURE, INC.'s EDEN ISLES, a system of perimeter and interior canals connected to Grand Lagoon and Lake Pontchartrain.

3) At ST. TAMMANY PARISH DRAINAGE DISTRICT No. 2, which is co-extensive with EDEN ISLES, a levee system, drainage canals, and a pumping station.

The extent of the development of canal and channel systems contemplated by LEISURE, INC., is well defined in Defendants' Exhibits L-1 and 160.

The Special Master found these three projects substantially complete. Both commercial developments do contemplate further work, typically associated with residential subdivision development.

Plaintiffs' original complaint sought injunctive and other relief against both developments to prevent further dredging and work without permits issued by various federal agencies or Environmental

Policy Act (NEPA). The Special Master found that neither BRADLEY-MCDONALD nor LEISURE nor any other defendant contemplate further dredging canal construction or related type work. Much of the area known as EDEN ISLES has been sold to other parties not before the Court, and there is no evidence that any such parties contemplated dredging, canal construction or work that would arguably require federal permits or any "major federal action" within the meaning of NEPA.

Moreover, the continuing effect of the Federal Water Pollution Control Act and other federal statutes impose on-going responsibilities on the part of the developers and landowners, and violations of these statutes can result in revocation of any existing permits[1] or other punitive action.

The Court concurs that plaintiffs' suit against the substantially complete developments outlined in the Special Master's reports and shown in Defendants' Exhibits L-1 and 160 and Bradley-McDonald Exhibit 10, is barred by laches; however, any further work that might be contemplated by defendants or third parties at either development is unaffected by this opinion, and would, of course, proceed in accordance with all applicable laws would be subject to review in the courts.

Accordingly, let judgment be entered DISMISSING plaintiffs SAVE OUR WETLANDS, INC.'s and FRANCOIS JELALIAN's petition for injunctive relief and for declaratory judgment.

New Orleans, Louisiana, this 27th day of January, 1975.

UNITED STATES DISTRICT JUDGE

1 See Permit issued LEISURE, INC. [Plaintiffs' Exhibit 229] and Permit issued BRADLEY-McDONALD [Bradley-McDonald Exhibit 10], which provide in part:

"(g) That this permit may at any time be modified by authority of the Secretary of the Army if it is determined that, under existing circumstances, modification is in the public interest.* The permittee, upon receipt of a notice of modification, shall comply therewith as directed by the Secretary of the Army or his authorized representative.

(h) That this permit may be revoked by authority of the Secretary of the Army if the permittee fails to comply with any of its provisions or if the Secretary determines that, under the existing circumstances, such action is required in the public interest.*

*A judgment as to whether or not suspension, modification or revocation is in the public interest involves a consideration of the impact that any such action or the absence of any such action may have on factors affecting the public interest. Such factors include, but are not limited to navigation, fish and wildlife, water quality, economics, conservation, aesthetics, recreation, water supply, flood damage prevention, ecosystems and, in general, the needs and welfare of the people."

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SAVE OUR WETLANDS, INC. (SOWL) ET AL — CIVIL ACTION

VERSUS — NO. 74-2919

UNITED STATES ARMY CORPS OF ENGINEERS ET AL — SECTION "H"

ORDER

At a hearing on February 20, 1975 on objections to the Master's Report, the Court, after argument of all counsel:

1. Overruled the so-called "objections" to the Master's Report;
2. Denied plaintiffs' motion for a new trial; and
3. Reinstated its order of January 17, 1975, for the reasons stated in the record and as follows:

F.R.Civ. P. 53(3)(2) entitled "Master's Report for Non-Jury Action" states:

"In an action to be tried without a jury the court shall accept the

master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

This rule has been interpreted to require the objecting party to file specific objections to findings of fact by the Master for consideration by the Court and to serve such objections on the opposing parties and the Court prior to hearing in accordance with F.R.Civ. P. 53(e)(2) and F.R.Civ.P.6(d).

Moore's Federal Practice, 2d Ed,Vol. 5a, P53.11, p. 2994, on the question of objections to the Master's Report, provides:

"Objections to the master's report have been likened to special demurrers

> and to assignments of error in appellate proceedings, but in an event it is clearly established that they must specifically point our the errors complained of so as to raise well-defined issues for the court's consideration. Since mere general objections would compel the court to review the whole case, and thus would defeat the very purpose of reference, such vague and general objections should be overruled."

At the hearing argument of counsel for plaintiffs was allowed by the Court for the record; however, counsel's argument was directed primarily to substantive issues and not to specific findings of the Master on the issue of laches. Further, written argument was not in the form of objection to findings and was not properly served on opposing counsel or the Court. Counsel for plaintiffs made reference to exhibits, at least some of which, as the Court has observed and noted, were <u>not</u> in evidence, and thus not proper for consideration by the Master at trial, and not properly

before this Court at the hearing. The Court ruled that none of the so-called "objections" was in conformity with the requirements of Rule 53; overruled all of the "objections"; then ruled on each "objection" individually.

Under Rule 53 it is clearly established that objections to the Master's Report must specifically point out the errors complained of so as to raise well-defined issues for the Court's consideration.

The so-called "objections" filed by plaintiffs to the Master's findings are so argumentative, vague, confusing and general that they do not meet the specificity requirements of Rule 53 and do not properly challenge any of the facts found by the master which bear on the issue of laches, which was the only issue before the Court/ It might be noted, inferentially, that the plaintiffs literally dumped upon the Master a hughe, ill-

assorted, and poorly organized batch of so-called exhibits, most of which have been identified by more than one letter or number.

At the hearing the findings of the master, not having been shown to have been clearly erroneous, were adopted by the Court.

On the question of the granting of a new trial, F.R.Civ.P. 59 provides:

> "(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues. . .; (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

Although both Rule 59 and Rule 53(e)(2) provide for new evidence to be received at the hearing on the report in the Court's discretion, the Court finds that no new evidence

was properly offered for presentation at the hearing and no sufficient reasons for not having presented relevant testimony at trial were argued.

New evidence should meet the traditional test which requires that movant ". . . show facts from which the court may infer reasonable diligence on the part of the movant . . ." in attempting to discover the evidence. Moore's Federal Practice, 2d Ed., Vol. 6a P59.08[4], pp. 59-123.

The Court found that the testimony offered at the hearing, that of Dr. Aiken, who is a resident of this area, could have been available to counsel prior to trial and, at any rate, was not shown to be in any way relevant to the issue of laches.

For the foregoing reasons, as well as those contained in the record as stated a the

hearing, the motions for a new trial were denied, and the objections to the Master's Report were overruled. Further, the previous ruling of this Court, issued on January 17, 1975, was reinstated.

New Orleans, Louisiana this 25th day of February, 1975.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SAVE OUR WETLANDS, INC. (SOWL) ET AL	CIVIL ACTION
VERSUS	NO. 74-2919
UNITED STATES ARMY CORPS OF ENGINEERS, ET AL	SECTION "H"

SUPPLEMENTAL ORDER

In this matter the Court has received two Reports Recommendations made by the Special Master. The Special Master's Report and Recommendation issued on December 19, 1974 (hereinafter referred to as the "First Report") recommended that the plaintiffs' claim for preliminary and permanent injunctive and declaratory relief against one defendant, Bradley-McDonald, Inc., be dismissed as barred by laches, and that the plaintiffs' demand for preliminary injunctive and declaratory relief against Leisure, Inc., and the remaining de-

fendants be denied on grounds that there was a finding of no immediate and irreparable injury.

Thereafter, the plaintiffs filed timely objections to the December 19, 1974 report, but have failed to date to set the objections for hearing, and the recommendations of the First Report were found by the Court to have not been clearly erroneous and were therefore adopted by the Court by its order of January 27, 1975. Subsequently, on January 10, 1975, the Special Master issued a First Supplemental Report and Recommendation (hereinafter referred to as the "Second Report"), which recommended that the plaintiffs' claim for permanent injunctive and declaratory relief against all other defendants be dismissed as barred by laches.

As stated, on January 27, 1975 the Court issued an order, adopting both of the Special Master's Reports, dismissing the plaintiffs'

claim for both preliminary and permanent injunctive and declaratory relief against Bradley-McDonald, Inc., Leisure, Inc., and all remaining defendants as barred by laches. The Court issued this order under the mistaken impression that ten days had elapsed since service of the Second Report on the parties without the filing of objections thereto.

It now appears that timely objections were made to the findings embodied in the Second Report and noticed for hearing by the plaintiffs' in accordance with Fed.R.Civ.P. 53(e)(2). Because of the plaintiffs' failure to file timely notice of a hearing on objections to the First Report, the Court's order of January 27, 1975 is unaffected insofar as the dismissal of the plaintiffs' claim for both preliminary and permanent injunctive and declaratory relief against Bradley-McDonald, Inc. and preliminary injunctive and declaratory relief as to Leisure,

Inc. and the remaining defendants; however, that order is suspended insofar as the dismissal of the plaintiffs' claim for permanent injunctive and declaratory relief against Leisure, Inc. and all remaining defendants.

Plaintiffs have noticed their objections to the Second Report, issued January 10, 1975, to be heard on February 5, 1975. The Court hereby continues the February 5, 1975 hearing until 9:00 a.m. on February 20, 1975, in order to allow sufficient time for the hearing of plaintiffs' objections. At that time the Court will receive evidence as to whether or not the Second Report's recommendation is clearly erroneous, i.e., whether or not the recommendations contained in the Second Report that plaintiffs' claim for permanent injunctive and declaratory relief against Leisure, Inc. and the remaining defendants should be dismissed as barred by laches.

New Orleans, Louisiana, this 31st day of

January, 1975.

UNITED STATES DISTRICT JUDGE

SAVE OUR WETLANDS, INC. (SOWL), et al., Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS et al., Defendants-Appellees.

No. 75-1750.

United States Court of Appeals, Fifth Circuit.

April 4, 1977.

Action was brought by environmental group to enjoin further construction of real estate project. The United States District Court for the Eastern District of Louisiana, at New Orleans, R. Blake West, J., entered a judgment overruling objections to special master's report recommending dismissal of complaint as barred by laches and an appeal was taken restricted to issues of laches. The Court of Appeals, James C. Hill, Circuit Judge, held, inter alia, that the plaintiffs had been guilty of delay when they waited many years after construction which most drastically altered the basic character of former swampland before bringing suit, that the delay was inexcusable because of the highly publicized and visible nature of project and that because of defendant's large expenditures on development and advertising and minimal impact on environment by completion of contract, the requested postponement of further construction pending environmental impact statement would unduly prejudice defendants.

Affirmed.

1. Health and Environment ⇐25.5

Equitable doctrine of laches can apply in context of environmental litigation; to apply defendant must show a delay in asserting right or claim, that delay was not excusable, and that there was undue prejudice to parties against whom claim was asserted.

2. Health and Environment ⇐25.5

Environmental group bringing action for declaratory and injunctive relief to halt real estate development located on drained land on shore of lake were guilty of unreasonable delay where the actions which most drastically change area took place many years before action was begun and to the extent the plaintiffs were challenging issuance of permit by Corps of Engineers they were guilty of unreasonable delay where they failed to present any comments or make objections at public hearing on application and waited more than 19 months after permit was issued before bringing action. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq., Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C.A. § 403.

3. Health and Environment ⇐25.5

Record in action by environmental group for declaratory judgment and order restraining real estate development on drained land showed that the delay of plaintiffs in asserting claim was inexcusable due to the highly visible and publicized nature of project which had been continuing for a number of years prior to the bringing of litigation. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C.A. § 403.

4. Health and Environment ⇐25.5

Plaintiffs, until they received an indication to contrary, were entitled to

presume that public officials responsible for approving objected to real estate project would act in accordance with law, but since they were on notice that the construction of development was well underway before public notice of developer's permit application was issued they knew or should have known that environmental effects of construction might well occur before preparation of an environmental impact statement, and wait of more than two and one-half years after permit was issued was an inexcusable delay given visibility and publicity of development. Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C.A. § 403.

5. Equity ⇐71(1)

Mere lapse of time does not constitute laches.

6. Health and Environment ⇐25.5

In assessing degree of prejudice to defendant real estate developer, sued by environmental group to enjoin the state project, caused by the inexcusable delay of plaintiffs in bringing suit, court was required to balance equities, considering both expenditures which had been made by defendants and the environmental benefits which might result if plaintiffs were allowed to proceed with litigation. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

7. Health and Environment ⇐25.10

In view of record showing that defendant real estate developers had expended over $26,000,000 on project before bringing of suit by environmental group to enjoin further construction and that large portions of project had been substantially completed by that time and one of plaintiff's own witnesses concluded that the development would have a minimal environmental impact, requested postponement of further construction pending preparation of an environmental impact statement would unduly prejudice defendant and was denied. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, and HILL and FAY, Circuit Judges.

JAMES C. HILL, Circuit Judge:

The plaintiffs in this environmental case are appealing from an order and judgment dismissing their complaint on the ground that it is barred by laches. Save Our Wetlands, Inc., ("SOWL"), a Louisiana non-profit corporation, and Francois Jelalian, a private individual, brought this action for declaratory and injunctive relief on October 29, 1974, naming as defendants 37 individuals, corporations and governmental agencies. The federal defendants named were the United States Army Corps of Engineers, the Environmental Protection Agency, and the Department of Housing and Urban Development, together with various officers of these agencies. The non-federal defendants included Leisure, Inc. ("Leisure") and Bradley-McDonald Corporation ("Bradley-McDonald"), the developers of two real estate projects known, respectively, as Eden Isles and Mariner's Village.

The plaintiffs alleged in their complaint that the two real estate developments, located on the north shore of Lake Pontchartrain, were causing serious adverse effects on the environment. The complaint contended that lakes Maurepas, Pontchartrain, Catherine and Borgne, all located in Southern Louisi-

ana, comprised a single ecological unit, referred to as the MPCB estuary, and that this ecosystem was on the verge of "collapse" due to the allegedly indiscriminate development of the Mariner's Village and Eden Isles projects. The plaintiffs' principal allegation concerned the validity of certain permits issued to Leisure and Bradley-McDonald by the United States Army Corps of Engineers ("the Corps"). The plaintiffs alleged that the Corps had violated the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. § 4321 *et seq.*, and various other federal statutes, by issuing the permits pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899 ("Rivers and Harbors Act"), 30 Stat. 1151, 33 U.S.C. § 403. The plaintiffs urged the district court to order an immediate regional cumulative study of the MPCB estuary and to impose a 30-month moratorium on the issuance of further Corps of Engineers permits in the MPCB area.

Two days after the complaint was filed, the district court entered an *ex parte* order temporarily restraining Leisure from conducting pumping and dredging operations adjacent to Lake Pontchartrain. The order was to take effect when plaintiff SOWL posted security of $5,000, but SOWL failed to do so and the order never became effective.

Thereafter, upon stipulation of the parties, the district court referred the suit for trial before a Magistrate sitting

1. Trial was held before the Special Master on November 14, 15, 16, 17, 21, 22, 25, 26, 1974, and January 3, 1975.

2. The Special Master's Report also dismissed certain plaintiffs for lack of standing. The plaintiffs SOWL and Jelalian attempted in their complaint to include as additional plaintiffs various species of wildlife allegedly being destroyed by defendants. For example, the complaint named, among others, rangia cuneata (clam), cynoscion nebulosus (speckled trout), the Southern bald eagle and the American alligator. In his December 20, 1974, report, the Special Master dismissed for lack of standing all of the species of wildlife named as plaintiffs.

as Special Master, pursuant to Rule 53, F.R.Civ.P. Upon agreement of counsel, the Special Master determined to try the issues of standing, laches and preliminary injunctive relief prior to the trial of the other issues.[1]

On December 20, 1974, the Special Master entered his first Report, which included a recommendation that SOWL's motion for preliminary injunction be denied.[2] On January 10, 1975, the Special Master submitted a Supplemental Report containing further findings of fact and conclusions of law and recommending that the complaint be dismissed as barred by laches.

The district court, believing that the time for filing objections had expired, entered a judgment order on January 28, 1975, adopting the Special Master's Report and Supplemental Report and dismissing the action on the basis of laches. Subsequently, upon ascertaining that the objections and motion for a new trial had been timely filed, the district court suspended its previous order and on February 20, 1975, held a hearing on the objections and motion for new trial. Finally, on February 28, 1975, the trial judge entered an order overruling the objections to the Special Master's Reports, denying a new trial and reinstating its previous order of January 17, 1975. This appeal followed.

By order dated September 24, 1975, this Court restricted the issues on appeal to the issue of laches. The appellants

have also limited this appeal in terms of the parties to whom it applies. Although the defense of laches was found by the district court to be available to the developers of both Mariner's Village (Bradley-McDonald Corporation) and Eden Isles (Leisure, Inc.), the plaintiffs have not appealed that portion of the district court's judgment pertaining to the Mariner's Village Development. This opinion, therefore, discusses only the facts and issues applicable to the Eden Isles development.

I. *The Facts.*

Eden Isles is a real estate development consisting of approximately 5,300 acres located on the northern shores of Lake Pontchartrain and bisected into two parcels known as Eden Isles East (2,300 acres) and Eden Isles West (3,000 acres). In approximately 1927, the area known as Eden Isles was enclosed with dikes and levees, drained and used for agricultural purposes. These improvements were undertaken pursuant to the authority of the St. Tammany Police Jury, the local governing body responsible for creating drainage districts to be used in the reclaiming of marsh lands. The property on which Eden Isles is located lies within the area known as St. Tammany Parish Drainage District No. 2.[3] Following construction of the improvements by the Drainage District, the area was maintained as dry land until the 1930's when, as a result of the economic depression,

3. The District was created in 1925 under Louisiana law by an ordinance of the St. Tammany Police Jury, which appointed a Board of Commissioners to supervise the District.

4. After Hurricane Carmen, in September, 1974, there was a break in the levee which, until it was repaired after three or four weeks, caused flooding in Eden Isles East.

the Drainage District became inactive and its facilities and levees suffered deterioration. During this period, the area again flooded.

In 1962, the St. Tammany Parish Police Jury became the governing body of the District and began rehabilitation of the project. Between 1962 and 1966, the Police Jury issued almost $2,000,000 in bonds to finance works to redrain the area and renovate the levees, canals and pumping station. Renovation was completed by 1966 and, except for a brief period in 1974,[4] Eden Isles has been dry land ever since that time. There is no indication in the record that the Police Jury ever applied for or obtained any permit from the Corps of Engineers for any of the installations on Drainage District No. 2.

In January, 1969, Leisure acquired the 5,300 acres known as Eden Isles East and Eden Isles West. From that time until the trial of this case, Leisure spent over $26,000,000 to develop the project.[5] The developments on Eden Isles West include a perimeter and interior canal system, construction of which was begun in 1969 and completed in March, 1973. During this period, development of Eden Isles was progressing virtually every day and, from 1970 to 1973, work was carried on 24 hours a day. Not only has Leisure expended large sums of money on Eden Isles over a period of several years, the development has been a highly visible project since its inception.[6] Moreover,

5. These expenditures included the costs of land acquisition, engineering, land fill, sewers, sewer treatment facilities, pumping stations, water facilities, streets, bulkheads, bridges, maintenance and advertising.

6. In finding number 30 of his First Supplemental Special Master's Report and Recommendation, the Magistrate stated:

the project has been highly publicized by Leisure since January or February of 1970. Beginning at that time and continuing through September, 1974, Leisure spent over $850,000 to advertise the project in the New Orleans Metropolitan area, using various media, including newspapers, television, radio, brochures, pamphlets, magazines and billboards.

The canal system of Eden Isles West is so constructed that craft departing from the canals pass into a basin known as Grand Lagoon from which they then pass through a channel into Lake Pontchartrain. In October, 1971, Leisure submitted to the Corps an application for a permit under Section 10 of the Rivers and Harbors Act, seeking permission to dredge an entrance channel from Lake Pontchartrain to Grand Lagoon. The Corps thereafter requested that Leisure submit a revised application covering not only the entrance channel, but also the interior canal system and the connecting channel to Lake Pontchartrain. Leisure complied with this request and submitted its revised application to the Corps on February 21, 1972.

On February 25, 1972, the Corps issued public notice of the permit application, describing the work as follows: *"Character of Work*: Dredge and maintain an entrance channel from the Pontchartrain and a system of connecting canals. All

The excavation used six to nine draglines and four to six bulldozers at a time. One dragline had a boom 110 feet long that could be seem five miles away. At times there were two dredges on the job. The equipment was lighted at night, and the large draglines had lights on them. The dredges worked 24 hours a day and were lighted "extremely well" and looked like "floating cities."

The Report also noted that the work was visible from Interstate 10 and Highway 11 in the daytime and at night.

spoil will be placed on property owned by the applicant and none will be placed in the lake." Leisure obtained from the Louisiana Stream Control Commission, the Louisiana Wildlife and Fisheries Commission and the St. Tammany Parish Police Jury letters expressing no objection to the issuance of the permit. Subsequently, on March 9, 1973, the Corps, with the concurrence of the Department of the Interior, issued the permit to Leisure.[7] No Environmental Impact Statement was filed concerning the permit. After public notice of Leisure's permit application was made in February, 1972, and prior to the issuance of the permit more than one year later on March 9, 1973, neither plaintiff Jelalian nor any other member of SOWL made any protest, objection, or comment concerning the permit or any other aspect of the project to Leisure, the Corps, the St. Tammany Parish Police Jury, or any other defendant in this lawsuit.

The record indicates that the plaintiffs had knowledge of the Eden Isles project before their suit was filed in October, 1974. Commercial fishermen who are members of SOWL testified before the Magistrate that they knew of the original Drainage District No. 2 and of the subsequent development of Eden Isles. They also testified that they have been unable to fish in the area since 1968, when the area was redrained. Moreover,

7. The permit did not apply to any portion of Eden Isles East. The permit authorized Leisure "to dredge and maintain an entrance channel, yacht basin, and connecting channel and install and maintain bulkheads, fills, revetments, culverts, and docks, in Lake Pontchartrain and Grand Lagoon . . . ." Thus, although the Corps required Leisure to include the interior canal system in its revised permit application, the permit, as issued, did not cover that system.

Mary Halpin, the president of SOWL, testified by deposition that she had been aware of the development of Eden Isles for "one or two years."

The defendants presented evidence that the Eden Isles project was substantially complete by late 1974 when the plaintiffs brought this suit. The Special Master determined from the evidence the extent of the work that had been completed in Eden Isles by December 26, 1974, as follows:

Unit 1 and 1A	99%
Unit 2 and 2A	99%
Unit 3	99%
Unit 4	53%
Unit 5	21%

The Special Master found in his report that 800 to 900 lots and other property, having a value in excess of $18,000,000, had been sold by Leisure subject to its meeting certain improvement and construction obligations with respect to roads, sewerage, water, streets, bulkheads and drainage. He noted further that none of the property owners who had purchased lots from Leisure were parties to this litigation. The Special Master concluded that most of the improvements on Eden Isles had been completed or were near completion when his Supplemental Report was submitted on January 10, 1975. A golf course located on the northern portion of Eden Isles West was 90% complete at that time. In addition, eighteen miles of canals had been dug, and no further canal work was anticipated. The only remaining work involved completion of the construction which had been started on the streets, sewer system, and water systems, as well

as completion of the bulkheading on the canals which had been dug. At that time, almost all of the lots bordering on canals in Eden Isles West had been sold to individual purchasers, so that neither Eden Isles nor Leisure had any interest in that property. Although approximately 900 acres remained unsold in Eden Isles West, 52 homes had been constructed in that section.

With respect to Eden Isles East, the Special Master found that Leisure owned only 30% of the land in the section at the time his Report was submitted. The remaining property had been sold, or was under option for sale, to others. The Special Master also concluded that Leisure had no intention of doing any dredging or excavation on the East side and that the only work that Leisure had performed on the East side involved the maintenance of levees.

II. *The Application of Laches.*

[1] It is now settled that the equitable doctrine of laches can apply in the context of environmental litigation. *Ecology Center v. Coleman*, 515 F.2d 860, 867 (5th Cir. 1975); *Clark v. Volpe*, 342 F.Supp. 1324 (E.D.La.1972), *affd.* 461 F.2d 1266 (5th Cir. 1972). As indicated in the *Clark* case, there are three independent criteria which must be met before laches can be applied. The defendant must show: (1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted. Since we conclude that the district court properly applied these standards to the case at bar, we affirm.

A. *Delay.*

[2] The plaintiff initiated this action on October 29, 1974. The actions com-

plained of by the plaintiffs occurred at different times during several stages of the Eden Isles development and, consequently, the delays involved in bringing this litigation vary in length depending upon the claims presented. To the extent that the plaintiffs are now challenging the conversion of the Eden Isles property to dry land, they have delayed the longest.[8] The construction of dikes, levees and dams was first completed in 1927. After a lengthy interval when the area was again submerged, it was redrained in the 1960's and, except for a three or four week period in 1974, it has been dry land since 1966. Thus, the construction which most drastically altered the basic character of the area was undertaken many, many years before the instant case was begun.

To the extent that the plaintiffs are challenging the Corps of Engineer's issuance of the permit to Leisure in March, 1973, they are again guilty of delay in asserting their claims. The Corps issued public notice of Leisure's permit application on February 25, 1972. Although the permit was not issued until over one year later, on March 9, 1973, the plaintiffs failed to present comments, make objections or even to ask questions concerning the permit application. Rather, after the permit was issued, the plaintiffs waited until over nineteen months had passed before they brought this action.

8. Paragraph 68 of plaintiffs' complaint sets forth the following averments and allegations:

> As previously alleged, the St. Tammany Police Jury with the guiding hand of the District Attorney of St. Tammany Parish, began illegal procedures and manuevers [sic] to become the governing authority of Drainage District # 2, and to dyke and drain the area of what is now known as Eden Isles. Drainage District # 2 received no permit for the work performed by them in approximately 1927-1929. And the St. Tammany Parish Police Jury received no permit from the United States Army Corps of Engineers to dyke and drain this land in 1964; and are presently still performing illegal operations on the North Shores of Lake Pontchartrain.

B. *The Delay Was Inexcusable.*

[3] The district court concluded that the plaintiff's delay in bringing this action could not be excused. The Special Master had concluded that Eden Isles was a large and highly visible project which could not have escaped public attention. Construction of the canal complex began in 1969 and continued until March, 1973, during which time the work was performed by six to nine draglines and four to six bulldozers at a time. The site was lighted at night and was plainly visible from two major highways. The Eden Isles development was not only physically visible to the general public, including the plaintiffs, the project was highly publicized. Beginning as early as January or February of 1970 and continuing through September, 1974, Leisure spent over $850,000 for advertising by newspapers, television, radio, brochures, pamphlets, magazines and billboards. The Special Master found that the progress of the work continuously appeared in newspapers, with advertisements and maps showing the exact location of Eden Isles on the northern shore of Lake Pontchartrain, and with offers of tours and promotional campaigns.

Despite the extensive advertising and visibility of Eden Isles, the appellants contend that their delay in bringing this litigation is excusable. They argue that the length of their delay, if any, should not be measured by beginning from the

point in time when the Eden Isles development became visible and publicly known. Even if they knew or should have known of the development, appellants argue, neither the visibility nor the publicity of the project put them on notice of any illegality upon which this litigation might be based. In his explanation of this position during oral argument, counsel for appellants argued that his clients could presume that the responsible public officials would act in accordance with all environmental and other laws applicable to the Eden Isles development. Essentially, appellants argue that their delay in bringing this case is excusable because they were unaware of any illegality in the Eden Isles project until some unspecified date after Leisure began construction. Without indicating when they believe the delay period for determining laches should have begun to run in this case, appellants' brief contains the following statement:

> Appellants do not believe that there was any inexcusable delay or lack of diligence shown on their part. There is no evidence in the record to indicate that Mary Halpin president of SOWL,

9. Notice was given by publishing an announcement of the permit application in certain newspapers and by mailing the announcement to a large number of interested parties who requested such notice.

10. The record indicates that developers sometimes begin construction of an interior canal system before seeking a permit pursuant to Section 10 of the Rivers and Harbors Act. The record contains a letter from the District Engineer of the Corps of Engineers which states as follows:

> Under existing policy with respect to "dead-end" canals on upland property, the proponent of canal work which will be connected to navigable waters should submit an application for a permit, including a proposed plan of development, to the applicable Corps District Engineer before commencing any form of excavation work. Where a connection to navigable waters has not yet occurred but the canal construction on the upland *is planned or has already begun*, the District Engineer will, in writing, advise the proponent of *the need for a permit whenever the canal is to be connected to navigable waters*, ask if he intends to connect to the navigable waters, and request the immediate submission of the plans, including any proposed development, and a permit application if a connection is so intended. If it is determined that a permit will be required, the District Engineer will advise the proponent that any work on the upland will be done at the risk that a permit may not be issued because of the effect that the canal may have on the navigable waters and that the existence of partially completed excavation work will not be allowed to weigh favorably

> *was aware that the Eden Isles project was illegal*, one or two years prior to the filing of the lawsuit. The trial counsel for SOWL indicated in his deposition that he had only uncovered information leading to further investigation within the year prior to the filing of the lawsuit. (emphasis added).

[4] Until they received an indication to the contrary, appellants were entitled to presume that the public officials responsible for approving the Eden Isles project would act in accordance with the law. *Clark v. Volpe, supra; Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1182 (6th Cir. 1972). The appellants, however, were on notice that construction of the Eden Isles development was well underway even before public notice[9] of Leisure's permit application was issued on February 25, 1972. The appellants, therefore, knew or should have known that the environmental effects of the construction might well occur before the preparation of an environmental impact statement ("EIS") if, indeed, the Corps determined that an environmental analysis would be required.[10]

Nonetheless, although appellants could have filed suit attempting to enjoin further construction until such time as an EIS was prepared and the permit was issued, appellants did not file their suit until over two and one-half years later. Given the visibility and publicity of the Eden Isles development, as well as the public notice of Leisure's permit application, we conclude that the plaintiffs' delay in bringing this litigation was inexcusable.

C. *Prejudice to the Defendants.*

[5, 6] The mere lapse of time does not constitute laches. *Natural Resources Defense Council v. Grant*, 341 F.Supp. 356 (E.D.N.C.1972); *Pennsylvania Environmental Defense Council v. Bartlett*, 315 F.Supp. 288 (M.D.Pa.1970), *aff'd.* 454 F.2d 613 (3d Cir. 1971). Even an inexcusable delay does not indicate the presence of the third factor required for a defense of laches—undue prejudice to the party against whom the claim is asserted. In assessing the degree of prejudice to the defendants in this case, we are required to balance the equities, considering both the expenditures which have been made by the defendants and the environmental benefits which might result if the plaintiffs are allowed to proceed with this litigation.

The district court found that the defendants had expended over $26,000,000

in evaluation of the permit application. (emphasis added).

11. In *Ecology Center of Louisiana v. Coleman*, 515 F.2d 860 (5th Cir. 1975), the defendants had spent $1,000,000 to acquire rights of way for a project which the plaintiffs alleged would cost approximately $667,000,000. The court concluded that laches did not apply because the defendants had not "established prejudice beyond a genuine question to the accomplishment of their statutorily charged duties." Similarly, in *Inman Park Restoration v. Urban Mass Transp. Admin.*, 414 F.Supp. 99 (N.D.Ga. 1976), the court stated:

> Although, a great amount of money, time and effort has already been expended, when compared to the total amount to be spent on the MARTA project it represents only a small percentage. Further, since no actual physical construction has commenced on the segments now under dispute, there may still be great environmental benefits to be derived from the litigation of the present actions.

on the Eden Isles project before the trial of this action. Moreover, large portions of the project had been substantially completed by that time. This case, therefore, is distinguishable from the cases in which the amounts expended were large in absolute terms but represented a relatively small percentage of the total expenditures anticipated.[11] In view of the substantial sums expended and the extent of construction which has been completed on the Eden Isles project, we conclude that preparation of an EIS at this point would produce very little, if any, environmental benefit. This conclusion is also compelled by the testimony of one of SOWL's own witnesses, who concluded that the Eden Isles development would have a minimal environmental impact on the MPCB ecosystem.

[7] In light of the plaintiffs' delay in bringing this action, therefore, we conclude that the requested postponement of further construction on this substantially completed project, pending preparation of an EIS, would unduly prejudice the defendants. In so holding, we note that the district court's opinion applies only to the "substantially complete developments outlined in the Special Master's reports" and we concur with the court's conclusion that "any further work that might be contemplated by de-

fendants or third parties at either development is unaffected by this opinion, and would, of course, proceed in accordance with all applicable laws and would be subject to review in the courts."

AFFIRMED.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

EDWARD W. WADSWORTH OFFICE OF THE CLERK

CLERK MAY 16, 1977

TO ALL PARTIES LISTED BELOW:

NO. 75-1750 - Save Our Wetlands, Inc. (SOWL), ET AL. v. U. S. Army Corps of Engineers, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of

the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

BY: _____
Deputy Clerk

/smg

cc: Mr. Plauche F. Villere, Jr.
Mr. Luke Fontana
Mr. John Schupp
Mr. Patrick J. Berrigan
Mr. Stephen A. Duczer
Mr. Charles Reasonover
Mr. Robert L. Klarquist

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SAVE OUR WETLANDS, INC. (SOWL) CIVIL ACTION

versus NO. 75-3155

EDWARD H. LEVI, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, COL. EARLY RUSH, COMMANDER NEW ORLEANS DISTRICT, U. S. ARMY CORPS OF ENGINEERS AND WEBB HART, PRESIDENT OF ST. TAMMANY PARISH POLICE JURY SECTION "H"

FILED: Jul 18, 1978

MEMORANDUM AND ORDER

This matter was brought before the Court on a motion to dismiss on the ground of res judicata and collateral estoppel. The motion was taken under advisement by The Honorable R. Blake West. The parties having agreed to submit the matter without the necessity of further oral argument, and the Court having considered the pleadings and memoranda of counsel, IT IS ORDERED that the motion to dismiss should be and it is hereby granted for the following reasons:

REASONS

Plaintiff originally filed an action, docketed in this Court as Civil Action No. 74-2919, against, among others, all of the defendants in the present case. The earlier action, which concerned development of the area known as "Eden Isles", was

dismissed for laches based upon the recommendation of a Special Master appointed to hear the matter, and the ruling was affirmed on appeal. *Save Our Wetlands, Inc. (S.O.W.L.), et al v. United States Army Corps of Engineers, et al,* 549 F. 2d 1021 (C. 5 1977).

The present action was filed during the pendency of that appeal. Defendant filed this motion to dismiss, alleging that the suit is barred by res judicata because the parties, the subject matter and the cause of action in this suit are substantially identical to the earlier suit. Brown v. Compton, 466 F.2d 1384 (C.5 1972).

The complaint in this action is concerned solely with the establishment of the St. Tammany Parish Drainage District No. 2 and the construction of levees and pumping of that area. Plaintiff seeks an injunction restraining the St. Tammany Parish Police Jury and the United States Army Corps of Engineers from maintaining levees in and draining of the eastern portion of Eden Isles. Plaintiff alleges that such draining and maintenance of levees is "future work" which was excluded from the ruling on laches in the first suit. No complaint is made with respect to development of the area in question since no such development is contemplated other than maintenance of levees in connection with Drainage District No. 2.

Thus, the sole issue with which the court is concerned is whether the maintenance of the levees and the alleged resultant drainage complained of in this suit was part of the subject matter litigated in the earlier suit. There is no question that it was. The entire complaint in this suit consists substantially of portions of paragraphs 49 through 68 of the complaint in the first suit. The prayer in the complaint seeks

precisely the same relief as was sought in paragraphs 6 through 9 of the prayer in C.A. 74-2919. The special master's report and recommendation and supplemental report discusses the subject matter extensively (see particularly conclusion of law #3, First Supplemental Special Master's Report and Recommendation). Finally, the Court of Appeal specially faulted plaintiffs for delaying longest with respect to the conversion of the area to dry land by the construction and maintenance of levees. *Save Our Wetlands v. U.S. Army Corps of Engineers,* 549 F.2d 1021, 1026-27, (C. 5 1977). The Court of Appeal also referred to the fact that work involving "the maintenance of levees" had been performed on the eastern portion of the levee in question. *Save Our Wetlands v. Army Corps of Engineers,* Supra at 1026.

Accordingly, the parties, subject matter and cause of action are identical to issues litigated in the earlier suit an and this action is barred by res judicata. *Aerojet-General Corp. v. Askew,* 511 F.2d 710 (C. 5 1975).

New Orleans, Louisiana, July 17, 1978.

s/ A. Duplantier
UNITED STATES DISTRICT JUDGE

OPINION OF U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-2704
Summary Calendar*

SAVE OUR WETLANDS, INC. (SOWL),
Plaintiff-Appellant,

versus

GRIFFIN B. BELL, Etc., ET AL.,
Defendants-Appellees,

LEISURE, INC.,
Intervenor-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

(APRIL 18, 1979)

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

For the reasons stated by the district court in its Memorandum and Order of July 17, 1978, we affirm its judgment.
AFFIRMED.

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* Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

Supreme Court, U. S.
FILED
SEP 25 1979
MICHAEL RODAK, JR., CLERK

No. 79-104

In the Supreme Court of the United States

OCTOBER TERM, 1978

SAVE OUR WETLANDS, INC. (SOWL), PETITIONER

v.

BENJAMIN R. CIVILETTI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
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Department of Justice
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-104

SAVE OUR WETLANDS, INC. (SOWL), PETITIONER

v.

BENJAMIN R. CIVILETTI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. A-102) is reported at 594 F. 2d 862. The opinion of the district court (Pet. App. A-99 to A-101) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1979. The petition for a writ of certiorari was filed on July 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a judgment dismissing a complaint on grounds of laches bars a subsequent action asserting the same claims against the same parties.

STATEMENT

This action is a second attempt by petitioner to halt development of a housing subdivision in southern Louisiana. A suit was first brought in 1974 ("*SOWL I*") against 37 individuals, corporations and federal and local government entities. The federal defendants named in the complaint were the United States Army Corps of Engineers, the Environmental Protection Agency, the Department of Housing and Urban Development, and various officers of these agencies (Pet. App. A-81).[1] Extensive findings were made by a Special Master (Pet. App. A-1 to A-58). In an order dated January 27, 1975, the district court adopted the report of the Special Master as its opinion and dismissed the complaint on the ground that it was barred by laches (Pet. App. A-59 to A-65). After the filing of objections, a final order reinstating the January 27 order was entered on February 25, 1975 (Pet. App. A-66 to A-72). The Fifth Circuit affirmed, 549 F. 2d 1021 (1977) (Pet. App. A-78 to A-96). A petition for a writ of certiorari was denied, 434 U.S. 836 (1977).

SOWL maintained that Lakes Maurepas, Pontchartrain, Catherine and Borgne comprise an ecological unit, referred to as the MPCB estuary, that was being threatened by indiscriminate development activities. Specifically, SOWL alleged that the Army Corps of Engineers violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and other statutes, by issuing permits pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, to two private development corporations (Pet. App. A-81 to A-82). One of these corporations, Leisure, Inc., was constructing a real estate development on an area known as Eden Isles. The permit in question was issued to

[1]The Attorney General was not named as a defendant but the complaint requested an order directed against him.

authorize the dredging of a canal to permit boats to pass from Eden Isles West into Lake Pontchartrain (Pet. App. A-86 to A-87). SOWL also sought an order enjoining the St. Tammany Parish Police Jury, a local government agency, from maintaining the levees that separate Eden Isles from Lake Pontchartrain.

On October 15, 1975, while the appeal in *SOWL I* was pending, petitioner initiated this action ("*SOWL II*"). The complaint set forth the same generalized allegations concerning the MPCB estuary as were asserted in the initial action. The complaint again alleged that the St. Tammany Parish Police Jury had illegally constructed and was illegally maintaining the Eden Isles levee system. In fact, as the district court found (Pet. App. A-100 to A-101), the entire second complaint "consists substantially of portions of paragraphs 49 through 68 of the complaint in the first suit." It requests precisely the same relief as was sought against essentially the same defendants[2] in portions of the first complaint.

On July 18, 1978, the district court dismissed the complaint on grounds of res judicata (Pet. App. A-99 to A-101). The court stated: "[T]he sole issue with which the court is concerned is whether the maintenance of the levees and the alleged resultant drainage complained of in this suit was part of the subject matter litigated in the earlier suit. There is no question that it was" (Pet. App. A-100). The court of appeals affirmed (Pet. App. A-102).

[2]Unlike the initial action, where SOWL requested relief directed against the Attorney General but did not name him as a defendant, the second complaint named the Attorney General as a defendant but did not seek any order directed against him.

ARGUMENT

The doctrine of res judicata is an absolute bar to the relitigation of the same cause of action between the same parties. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955). An action is barred by res judicata if a court of competent jurisdiction has previously rendered a final judgment on the merits in a suit involving the same cause of action between the same parties, or those in privity with them. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948).

Petitioner contends (Pet. 12-14) that the judgment in *SOWL I* was not a final judgment "on the merits" because the complaint was dismissed on grounds of laches and the substantive issues (or "merits") presented by the complaint were never reached. This contention is erroneous. The term "merits," when used in reference to res judicata, means a disposition on a legal ground rather than on a technical ground of pleading, practice or form. *Providential Development Co.* v. *United States Steel Co.*, 236 F. 2d 277, 280 (10th Cir. 1956); *Fairmont Aluminum Co.* v. *Commissioner*, 222 F. 2d 622, 625 (4th Cir.), cert. denied, 350 U.S. 838 (1955). A judgment dismissing a complaint as untimely is a judgment on the merits for purposes of res judicata. *Mathis* v. *Laird*, 457 F. 2d 926, 927 (5th Cir.), cert. denied, 409 U.S. 871 (1972); *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464, 466-467 (3d Cir. 1950). Were the rule otherwise, a litigant could continue to bring suit indefinitely upon a claim already judged to be too stale to litigate. When a suit is dismissed on the grounds of laches, the same cause of action[3] cannot

[3]Petitioners also allege (Pet. 9-12) that the second cause of action differs from the first in that the first suit was directed solely against developments in Eden Isles West while the present litigation involves only Eden Isles East. This purely factual issue was correctly resolved by the courts below, which held that the second complaint did not raise any new issue. As the district court found (Pet. App. A-100 to A-101), SOWL's first complaint included those developments in Eden Isles East that are the subject of the second complaint; indeed, the *SOWL II* complaint consists almost entirely of portions of the *SOWL I* complaint. The findings and recommendations of the special master clearly covered Eden Isles East (Pet. App. A-36 to A-45, A-55 to A-57).

be brought again in a manner that will cure the defect of laches. Thus, the court in the second case would once again have to consider the previously decided issue of laches. The rule of res judicata prevents such wasteful relitigation. "One trial of an issue is enough." *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 78 (1939).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

CARL STRASS
ROBERT L. KLARQUIST
Attorneys

SEPTEMBER 1979

DOJ-1979-09

Supreme Court, U. S.
FILED
SEP 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-104

SAVE OUR WETLANDS, INC. (SOWL),
Petitioner,

versus

BENJAMIN R. CIVILETTI, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT, LEISURE, INC., IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
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BRIEF OF RESPONDENT, LEISURE, INC., IN OPPOSITION

OPINIONS BELOW

The Court of Appeals' order affirming the judgment of the District Court is reported at 594 F.2d 862 (1979) (Pet. App. 102). The District Court's order dismissing plaintiff's complaint is unreported (Pet. App. 99).[1]

1 The plaintiff in this proceeding is Save Our Wetlands, Inc. (SOWL). The originally named defendants were Edward H. Levi, Attorney General of the United States, Colonel Early Rush,

JURISDICTION

The judgment of the Court of Appeals was entered April 18, 1979 (Pet. App. 102). No petition for rehearing was filed. The petition for a Writ of Certiorari was filed July 17, 1979. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

The question presented is whether this court should review the factual findings of the District Court and Court of Appeals, on which those courts concluded that the judgment in *Save Our Wetlands, Inc. v. United States Army Corps of Engineers*, 549 F.2d 1021 (5th Cir.), *cert. denied*, 434 U.S. 836 (1977), operated as res judicata with respect to the matters raised in plaintiff's complaint in the matter now before this Court.

STATEMENT OF THE CASE

The present proceeding represents plaintiff's second attempt to enjoin maintenance of a governmental drainage district begun in 1927, and development of the Eden Isles subdivision begun in 1969 (Pet. App. 84-

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Commander of New Orleans District, United States Army Corps of Engineers, Mr. M. W. Hart, President, St. Tammany Parish Police Jury — all in their official capacities — and the St. Tammany Parish Police Jury. Leisure, Inc., the developer of the Eden Isles subdivision, was permitted to intervene as a defendant. Pursuant to Fed. R. App. P. 43(c) and Sup. Ct. R. 48(3), Benjamin R. Civiletti, Colonel Thomas A. Sands, and Earl D. Broom have been substituted for their predecessors in office, Messrs. Levi and Bell, Early Rush, and M. W. Hart, respectively.

85). Plaintiff's first suit was filed in October 1974 (Pet. App. 81). Following extended litigation, including a nine-day trial held before a Special Master (Pet. App. 82 n.1), the District Court, in February 1975, held that plaintiff's complaint was barred by laches (Pet. App. 83). The Fifth Circuit affirmed, 549 F.2d 1021 (1977) (Pet. App. 78). This Court denied plaintiff's petition for certiorari. 434 U.S. 836 (1977).

After the District Court dismissed petitioner's first suit, petitioner brought the instant proceeding, making substantially the same allegations as those contained in the first suit. The District Court held that petitioner's second suit was barred by res judicata. The district court stated: "[T]he sole issue with which the court is concerned is whether the maintenance of the levees and the alleged resultant drainage complained of in this suit was part of the subject matter litigated in the earlier suit. There is no question [but] that it was." (Pet. App. 100). The court then held: "[T]he parties, subject matter and cause of action are identical to issues litigated in the earlier suit and this action is barred by res judicata." (Pet. App. 101). The Court of Appeals affirmed, 594 F.2d 862 (5th Cir. 1979) (Pet. App. 102).

REASONS WRIT SHOULD BE DENIED

Petitioner has already presented the same arguments to a Special Master, the District Court, the Court of Appeals, and this Court, in the first suit; and

the same contentions have been presented again in this, the second suit, to the District Court and Court of Appeals. No court has upheld petitioner's unfounded assertions. The issue involved in this proceeding does not warrant review by this Court. The well-settled federal doctrine of res judicata was correctly applied by the courts below.

Res judicata bars subsequent litigation between parties concerning any cause of action that has been subject to a final judgment on the merits rendered by a court of competent jurisdiction. *Montana v. United States*, 99 S.Ct. 970, 973 (1979); *Parklane Hosiery Co. v. Shore*, 99 S.Ct. 645, 649 n.5 (1979); *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

All of the elements of res judicata are present in this suit. Petitioner admits that the same parties involved in this present suit were parties to the first cause of action suit (Pet. 11).[2] Petitioner does not identify any evidence in the record that would call into question the District Court's and Court of Appeals' findings in this proceeding that the cause of action involved in this suit was the subject matter litigated in the earlier suit.

Petitioner, however, attempts to avoid the applica-

2 SOWL is the plaintiff in both actions. The defendants are also the same: (1) the District Commander of the New Orleans District Corps of Engineers, (2) the St. Tammany Parish Police Jury, (3) the President of the St. Tammany Police Jury, and (4) Leisure, Inc. Although the Attorney General of the United States is formally named as a defendant in only the second suit, the first suit also sought an order against the Attorney General.

tion of res judicata by contending that the decision holding that the first suit was barred by laches was not a judgment on the merits. However, a judgment on the merits, within the context of res judicata, means that the action was determined upon a legal right or substantive ground, as opposed to a disposition upon technical grounds of pleading or practice. *See Providential Development Co. v. United States Steel Co.*, 236 F.2d 277 (10th Cir. 1956); *Fairmont Aluminum Co. v. Commissioner*, 222 F.2d 622 (4th Cir.), *cert. denied*, 350 U.S. 838 (1955). The decision in SOWL's first suit was rendered upon the substantive basis that the matters attempted to be litigated therein were barred by laches. Relitigation of the same issues is barred by res judicata.

The judgment in this proceeding was essentially a factual determination. In holding that this present suit was barred by res judicata, the District Court determined:

> "The entire complaint in this suit consists substantially of portions of paragraphs 49 through 68 of the complaint in the first suit. The prayer in the complaint seeks precisely the same relief as was sought in paragraphs 6 through 9 of the prayer in C.A. 74-2919" (Pet. App. 100-01).

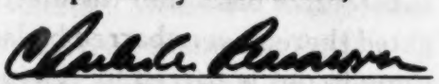
The lower courts compared the lengthy record in the first suit with the petition and parties before it in this, the second suit, and determined that the cause of action had previously been litigated between those same par-

ties and was therefore barred by res judicata.[3] As this case merely involves a factual determination made by the two courts below, this proceeding does not present an issue warranting review by this Court.

CONCLUSION

The judgments below were correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,



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3 In determining the applicability of res judicata, the court is not restricted to an examination of the opinions filed in the first proceeding, but may also examine the pleadings and record of the first suit. *See James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 459 n.7 (CA 5), *cert. denied*, 404 U.S. 940 (1971).

CERTIFICATE OF SERVICE

I, Charles K. Reasonover, attorney of record for respondent, Leisure, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of August, 1979, I served copies of the foregoing Opposition to Petition for Certiorari upon the Solicitor General of the United States and all other counsel of record in this proceeding by depositing same in the United States Mail, First Class, postage prepaid, addressed to them at their respective post office addresses.

Charles K. Reasonover